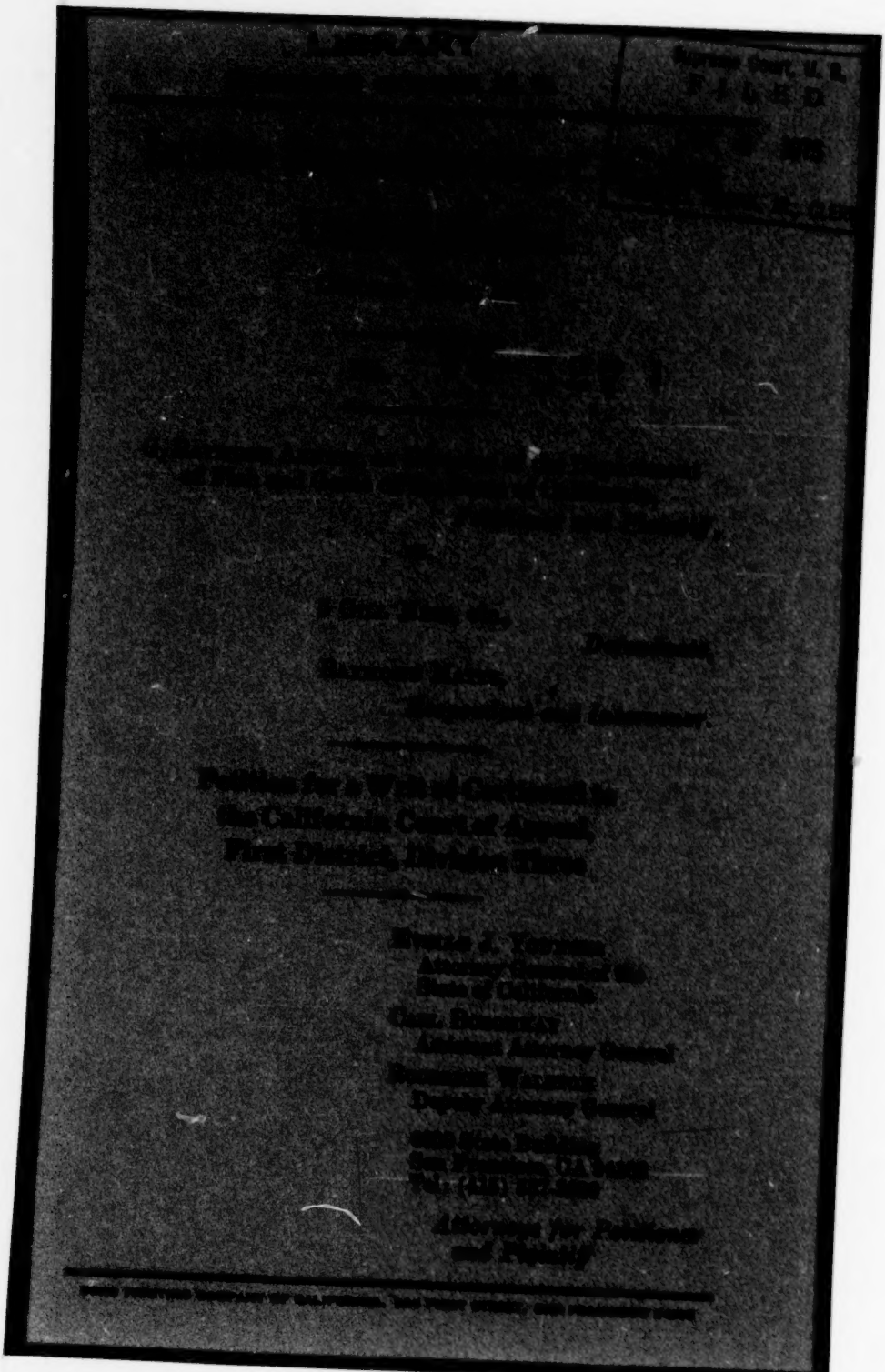

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,
Petitioner and Plaintiff,

vs.

5 GILL NETS, etc.,
Defendants,

RAYMOND MATTZ,
Respondent and Intervenor.

Petition for a Writ of Certiorari to the California Court of Appeal, First District, Division Three

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OPINIONS BELOW

The decision of the Court of Appeal, its order denying a petition for rehearing and the order of the State Supreme Court denying a petition for hearing are attached hereto as Appendix 1.

JURISDICTION

The decision of the Court of Appeal was rendered on May 27, 1975. Its order denying a petition for rehearing was rendered on June 26, 1975. The State Supreme Court denied a petition for hearing on July 23, 1975. A petition for a writ of certiorari is due on or before October 21, 1975. *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

This case, on remand from the decision of this Court in *Mattz v. Arnett,* 412 U.S. 481 (1973), presents four significant questions of federal Indian law, each of which was decided by a State court. This Court thus has discretion to grant a writ of certiorari under Rule 19(1)(a).

The questions presented for review are:

(1) Does Public Law 280, which exempts Indian fishing rights from State law if such rights are based on a federal "treaty, agreement, or statute," contain a similar exemption for rights assertedly based on executive orders?

(2) Does a State have the right to regulate Indian fishing on surplus reservation lands which are owned by non-Indians, which are not held in trust by the United States for the Indians' use and which were not traditionally used for tribal purposes?

(3) Assuming that Indians have the right to fish on a reservation for "subsistence" purposes, does the State have a right to define the nature of such "subsistence" fishing, and thereby prohibit the Indians from using gill nets for that purpose?

(4) Does a State have a right to regulate Indian fishing on a reservation when such regulation is reasonably related to the conservation of a fishery, at least when such fishing is not otherwise regulated by federal or tribal authorities and

when the State gives preferential fishing privileges to the Indians?

FEDERAL LAWS INVOLVED

This case involves an interpretation of (1) Public Law 280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1970), set forth in Appendix 2, (2) the presidential executive order extending the Hoopa Valley Indian Reservation, found in 1 *Kappler, Indian Affairs: Laws & Treaties* 815, set forth in Appendix 3, and (3) the Act of June 17, 1892, 27 Stat. 52, set forth in Appendix 4.

STATEMENT OF THE CASE

This case is on remand from the decision of the U. S. Supreme Court in *Mattz v. Arnett,* 412 U.S. 481 (1973). In that decision, the Court ruled that the lower portion of the Klamath River in northern California constitutes an Indian reservation. The Court remanded the case for a determination of California's right to regulate Indian fishing on the reservation. 412 U.S. at 485.

In 1969, wardens of the California Department of Fish and Game seized five gill nets owned by the intervenor, a Yurok Indian. CT 134-135.[1] At the time of the seizure, the nets were located adjacent to the Klamath River, within the confines of an Indian reservation. CT 135. The lands on which the nets were seized were, and are, owned by a private logging company. *Ibid.* There is no dispute that the nets were being used in violation of California law. Calif. Fish & Game Code §§ 8602, 8603, 8664, 11003. The Department accordingly brought an action in a State court to forfeit the nets. *Id.* at § 8630.

In the forfeiture proceeding, the trial court ruled that the area where the nets were seized was no longer an Indian

1. "CT" constitutes a reference to the Clerk's Transcript, and "RT" a reference to the Reporter's Transcript.

reservation, and did not reach the question of whether—assuming that the area was a reservation—California has jurisdiction to regulate Indian fishing thereon. The decision was affirmed by the State Court of Appeal. 20 Cal. App. 3d 729, 97 Cal. Rptr. 894 (1971). The State Supreme Court declined to hear the matter. 20 Cal. App. 3d 735, 97 Cal. Rptr. 898 (1971). The U. S. Supreme Court, after granting certiorari, reversed the decision of the Court of Appeal. *Mattz v. Arnett, supra.* On remand, the trial court ruled that California was without jurisdiction to regulate Indian fishing on the reservation. CT 123, 134. Its decision was again affirmed by the Court of Appeal. Appendix 1. The State Supreme Court again declined to hear the matter. *Ibid.*

The historical background of the area where the nets were seized is set forth in detail in *Mattz v. Arnett, supra, United States v. Forty-Eight Pounds of Rising Star Tea,* 35 Fed. 403 (N.D. Cal. 1888), *aff'd* 38 Fed. 400 (CCND Cal. 1889), and *Elser v. Gill Net No. One,* 246 Cal. App. 2d 30, 33-34, 54 Cal. Rptr. 568, 571-572 (1966). Briefly, the President, pursuant to an 1853 Congressional act authorizing the establishment of military reservations in California, issued an executive order in 1855 which established the Klamath River Reservation for "Indian purposes," encompassing an area one mile wide on each side of the Klamath River from its mouth to a point approximately twenty miles upstream. 1 Kappler, *Indian Affairs: Laws & Treaties* [hereinafter "Kappler"] 815. After an 1861 flood, the reservation was partially abandoned. In 1864, Congress passed an act authorizing the President to establish a total of four Indian reservations in California, and directing the termination of any existing reservations not retained under the act. 13 Stat. 39 (1864). Pursuant to this authorization, the President established four Indian reservations in California between 1870 and 1876. 481 U.S. at 493; 1 Kappler 815, 819, 828,

830-831. The last of these reservations, the Hoopa Valley Indian Reservation, consists of a twelve-mile square area located approximately fifty miles upstream from the mouth of the Klamath River. Lacking the authority to create any further reservations under the 1864 act, the President issued an executive order in 1891 which extended the Hoopa Valley Indian Reservation for "Indian purposes," an extension which included an area one mile wide on each side of the Klamath River from its mouth to the Hoopa Valley Indian Reservation. 1 Kappler 815. This extension thus included what had formerly been known as the Klamath River Reservation, and also a thirty mile strip between these reservations known as the Connecting Strip.[2]

Prior to 1891, most of the lands of the Klamath River Reservation were privately occupied by non-Indian settlers, and were not used for traditional tribal purposes. H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892); 23 Cong. Rec. 1598-99, 3918-19, 52d Cong., 1st Sess. (1892). Congress passed a statute in 1892 allowing these settlers to acquire title to their property, allowing other settlers to claim other reservation lands which were surplus to the Indians' needs and allowing the Indians to reserve other lands for trust allotments, Indian communities and other tribal purposes. 27 Stat. 52 (1892). The reservation status of the area survived the 1892 act, however, and remains in existence today. *Mattz v. Arnett, supra.*

At least by the 1930's, California regulated commercial fishing, but not subsistence fishing, by Indians on the Kla-

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2. For purposes of clarity, the reservation encompassing the 12-mile square area located approximately 50 miles upstream will be referred to as the "Hoopa Valley Reservation proper," the reservation located on the lower 20 miles of the river will be referred to as the "Klamath River Reservation," and the reservation located between these reservations will be referred to as the "Connecting Strip."

math River Reservation. Many Indians began to catch vast quantities of fish ostensibly for subsistence purposes, but actually for sale on the black market. California's Exh. 6(1). California thereupon began to regulate subsistence as well as commercial fishing by the Indians. *Ibid.*

California's regulatory program was modified and codified by the enactment of section 429.8, now section 7155, of the California Fish and Game Code in 1951. See Appendix 5. The section authorizes Indians on the Klamath River Reservation to fish "for subsistence purposes." The section also frees the Indians on the reservation of most restrictions imposed on the white man. For instance, the Indians are free of seasonal limitations and (except for certain critical species) daily limitations. However, the section, although authorizing the Indians to fish for subsistence purposes, does not permit the use of gill nets for such purposes.[3]

Indian fishing on the Klamath River Reservation is not regulated by the United States, the Yurok tribe or any other tribe. Thus, the decision of the lower court frees Indians on the reservation of any regulatory control whatsoever, and a number of members of the tribe have resumed the wasteful and commercial practices which led to California's regulation of the fishery in the first place. See Appendix 6.

ARGUMENT

Before proceeding with our legal argument, we wish to emphasize that California's regulation of Indian fishing on the Klamath River Reservation is, in our view, not harmful to the Indians' interests, and may even be helpful to their

3. The Court of Appeal erroneously stated that, under section 7155, "the only method of taking fish that has been permitted is by angling." Appendix 1, p. 4. However, section 7155(b) expressly authorizes the taking of fish by hand dip nets, as well as by angling.

interests. California's fishing laws do not discriminate against Indians fishing on that portion of the river, but instead—by giving them preferential fishing privileges under section 7155 of the State's Fish and Game Code—free them of most restrictions imposed on the white man. Our concern in this case, however, is that the fishery will suffer from the removal of *any* controls over Indian access to the fishery, which is the result of the decision of the Court of Appeal. Our concern is borne out by events occurring subsequent to that decision. Presently, a comparatively small number of Indians on the Klamath River Reservation are now taking vastly greater quantities of fish than they need for subsistence purposes, and are wasting or selling the excess quantities of fish taken. See n. 24, *infra*. The Indian community will suffer, in the long run, if these wasteful and excessive practices result in the degradation or destruction of the fishery. Hence, California's laws are designed to protect the interests of both the Indians *and* the fishery, to protect the needs of both her citizens *and* her resources.

But we do not ask the Court to grant our petition solely to protect the fishery from the mounting threat posed by the lower court's decision. Rather, we ask the Court to grant our petition primarily to resolve the lack of judicial authority on the question of whether, and under what circumstances, a state may apply its fishing laws to Indians on a reservation, particularly under the facts of this case. The Court has, on several recent occasions, clarified the law applicable in determining whether an area is an Indian reservation. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett, supra; DeCoteau v. District County Ct.*, ... U.S. ....., 92 S.Ct. 1082 (1975). But the Court has yet to clarify the laws applicable in determining the effect of a

State's fishing laws on such a reservation. Thus, this case presents issues which have significance in States other than California, and deserves the attention of this Court.

Whether, and under what circumstances, a State has authority to apply its fishing laws on Indian reservations depends on federal law. As this Court has observed on several recent occasions, "even on reservations state law may be applied to Indians unless such application would interfere with tribal self-government or impair a right granted or reserved by federal law." *Organized Village of Kake v. Egan*, 368 U.S. 60, 75 (1962); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217 (1959).[4] In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the Court noted that the principle of tribal sovereignty should be considered in interpreting federal law. As we shall see, however, no question of tribal sovereignty or self-government is presented in

4. In *Organized Village of Kake v. Egan*, *supra*, and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), the Court considered the Indians' fishing rights in light of the Alaska Statehood Act, which gives the United States "absolute jurisdiction and control" over Indian property, including reservations. 72 Stat. 339 (1958). The Court held that this act, in itself, does not authorize the United States to *exclusively* regulate fishing by Alaska's Indian tribes, and that Alaska may also regulate such fishing except to the extent inconsistent with other federal laws or with tribal self-government. Here, the 1850 act admitting California to statehood did not even purport to give the United States "absolute jurisdiction and control" over California's Indian tribes, but merely prevented California from interfering with the "primary disposal of the public lands within its limits" by the United States. 9 Stat. 452 (1850). Moreover, since the Court in the *Kake Village* case held that the Alaska Statehood Act only protected Indian rights existing at the time of the act's passage, 369 U.S. at 64-65, California's right to regulate the conduct of Indians would apparently be greater where, as here, the reservation was established *after* the passage of the act admitting California to statehood. Thus, the California statehood act provides an additional basis for California's right to regulate Indian fishing in this case.

this case, for the Yurok tribe does not regulate, or seek to regulate, fishing by its own members on the reservation.

Applying the foregoing principles here, we contend that a federal law, Public Law 280, expressly authorizes California to regulate Indian fishing on all reservations in California. However, even if this argument is not accepted, and even if the Indians on the Klamath River Reservation are held to have a fishing right, an additional inquiry must be made into the nature and extent of the fishing right under federal law. The fact that the Indians have a general right to take fish does not mean that the right is absolute, that the right is not subject to State limitations under a particular factual setting.

The lower court, however, apparently did not so view the case. The court construed the phrase "Indian purposes," as it appears in the executive order establishing the reservation, as creating a fishing right, and concluded that "State qualifications of those traditional rights was [sic] precluded by the Supremacy Clause." Appendix 1, pp. 8-9. Initially, we fail to see how the phrase "Indian purposes" can be held to create a fishing right, for the phrase is a redundancy. *Every* Indian reservation is obviously established for Indian purposes, and the rights of Indians on the reservation should not hinge on whether that phrase appears in the order establishing the reservation. Moreover, it is not even clear that the Klamath River Reservation was established for the purpose of enabling the Indians to fish.[5]

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5. The reservation, as originally established by the 1855 executive order, was situated along a river which "abounded in salmon and other fish," 412 U.S. at 487, and it is fair to conclude that the executive order contemplated that the Indians would take fish from the river. However, the 1891 executive order re-establishing the reservation was issued contemporaneously with the General Allotment Act of 1877, 24 Stat. 388. The purpose of the latter act, which formed the basic Indian law for nearly a half century,

More importantly, however, the lower court failed to make the additional inquiry—assuming that the executive order created fishing rights for the Indians—of whether federal law permits California to place limited restrictions on the exercise of those rights. Such an inquiry is required under federal law. This Court recently noted, in holding that the reference to "Indian purposes" in an 1854 treaty created Indian fishing rights which survived a 1954 act terminating the reservation, that:

> "What the precise nature and extent of those hunting and fishing rights were we need not at this time determine." *Menominee Tribe v. United States*, 391 U.S. 404, 407 (1968).

In this case, we contend that, if the Indians have fishing rights which are not affected by Public Law 280, the rights are subject to three limitations which the State may impose.

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was to end the tribes' nomadic activities by encouraging them to own lands for agricultural purposes, and to assimilate the tribes into white society. *Board of County Comm'rs v. Seber*, 318 U.S. 705, 716 (1943); *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). Thus, the purpose of the 1891 executive order, viewed historically, was probably to encourage the Indians to take up agrarian pursuits on the fertile lands adjacent to the river, not to encourage them to fish in violation of State laws applicable to others.

The lower court, apparently to prevent the "purposes" of the reservation from being construed in light of the purposes of the General Allotment Act of 1877, held that the reservation was established by the 1855 executive order, not the 1891 executive order. Appendix 1, pp. 3, 5. However, the court failed to note that the reservation, although originally established by the 1855 order, was discontinued prior to its re-establishment by the 1891 order. The 1864 congressional act, pursuant to which the 1891 order was issued, authorized the President to establish a total of four Indian reservations in California, and directed that existing reservations not retained under the act were to be discontinued. 13 Stat. 39 (1864). Pursuant to that act, the President established four reservations in California, the last being the Hoopa Valley Reservation proper, established in 1876. 481 U.S. at 493-94; 1 Kappler 815, 819, 828, 830-31. Since the President thus created four other

First, California may regulate the exercise of the rights on surplus reservation lands which are owned by non-Indians, which are not held in trust by the United States for the Indians' use and which were not traditionally used for tribal purposes. Second, assuming that the Indians have a right to fish for "subsistence" purposes, California may define the nature of "subsistence" fishing, and thereby prohibit the Indians from using gill nets for that purpose. Third, California may regulate Indian fishing to the extent that such is reasonably related to the conservation of the fishery, particularly—as here—where such fishing is not regulated by federal or tribal authorities and where California gives preferential fishing privileges to the Indians.

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reservations under the 1864 act, a federal district court ruled in the 1880's that the Klamath River Reservation no longer existed, and the decision was affirmed on appeal. *United States v. Forty-Eight Pounds of Rising Star Tea*, 35 Fed. 403 (N.D. Cal. 1888), *aff'd* 38 Fed. 400 (CCND Cal. 1889). The decision prompted the President to issue the 1891 executive order, extending the Hoopa Valley Reservation proper to include the former Klamath River Reservation.

If the Klamath River Reservation were not terminated by the 1864 act, or at least by the establishment of the fourth reservation thereunder in 1876, the President would have lacked authority to establish the fourth reservation, *i.e.*, the Hoopa Valley Reservation proper, since that would have been the fifth reservation established by presidential order. Moreover, if he lacked authority to establish the Hoopa Valley Reservation proper, he lacked authority to issue the 1891 order extending that reservation. Thus, either the Klamath River Reservation was terminated prior to 1891, or the Hoopa Valley Reservation proper and its extension were not legally established as a reservation. The intervenor, obviously aware of this dilemma, properly concedes that the Klamath River Reservation was terminated by 1876, "at the latest." 412 U.S. at 493. The Court of Appeal, in failing to consider whether the reservation was terminated prior to 1891, was obviously unaware of the implications of the dilemma.

LEED THROUGH

I. Public Law 280 Requires Indians on the Klamath River Reservation to Comply with California Law in Fishing on the Reservation.

In 1953, Congress passed a statute, Public Law 280, which authorizes several States, including California, to assume full civil and criminal jurisdiction over Indian reservations, and over the conduct of Indians on such reservations. 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1970). Appendix 2. However, the statute excepts from State law any Indian fishing rights "afforded" under a "Federal treaty, agreement, or statute." *Ibid.* On its face, the statute does not provide an exception for claimed fishing rights based on a presidential executive order, since such an order does not fall within the category of a treaty, agreement or statute. Hence, even if we assume that the executive orders of 1855 and 1891, in establishing the Klamath River Reservation, authorized Indians to fish in violation of State law, Public Law 280 ended that authorization. However, the Court of Appeal reached the opposite result by concluding that the Indians' asserted fishing rights were actually based on a statute, *i.e.*, the 1853 congressional act which authorized the President to issue the 1855 executive order. Appendix 1, pp. 5-6.

Initially, we note that the court's conclusion is inconsistent with a ruling rendered by the Commissioner of Indian Affairs in 1954, shortly after the passage of Public Law 280, to the effect that "there does not appear to be any federal statute which affords these Indians [of the reservations on the Klamath River] of any such right, privilege or immunity," such as to exempt them from California's fishing laws under Public Law 280. California's

Exh. 6(f).[6] Certainly this ruling, as a contemporaneous administrative interpretation of a statute, is entitled to weight. *Udall v. Talman,* 380 U.S. 1 (1964); 2A Sutherland, *Statutory Construction* (4th ed.) 238, 251-252, 255, 261-262.[7] However, we do not ask the Court to grant our petition merely to resolve differences between judicial and administrative interpretations of law. Rather, we ask such relief because the lower court's conclusion ignores the limitations which Congress—by making reference to "treaties, agreements, and statutes"—carefully inserted in Public Law 280, and also ignores the clear statutory and legislative history of that statute. Moreover, since many other States have received jurisdiction over Indian reservations under Public Law 280, the court's decision concerns issues which are not limited to California.

The statutory and legislative history of Public Law 280 convincingly reveals a congressional intent *not* to provide an exception for asserted Indian fishing rights based on an executive order, whether or not the order was issued pur-

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6. California suspended its enforcement program with respect to Indian fishing pending the Commissioner's ruling, and resumed its enforcement program after the ruling was rendered. The ruling assumed a wide significance in Congress, and was distributed to California's senators, Knowland and Kuchel, and to California's Congressman (later Senator) Engle, at their request. California's Exhs. 6(e), 6(f), 6(h).

7. The lower court's decision is also inconsistent with that of another California appellate court in *Elser v. Gill Net No. One,* 246 Cal. App.2d 30, 54 Cal. Rptr. 568 (1966). There, the court considered the Indians' fishing rights on the Connecting Strip, which was established by the same 1891 executive order which established the Klamath River Reservation. The *Elser* court concluded that there are "no federal statutes dealing with Indian fishing and hunting rights" in California within the meaning of Public Law 280. 246 Cal. App.2d at 37, 54 Cal. Rptr. at 574.

Moreover, the court's decision varies from the theory espoused by the courts in *Donahue v. Justice Court,* 15 Cal. App.3d 557, 93 Cal. Rptr. 310 (1971), and *Quechan Tribe v. Rowe,* 350 F.

suant to a congressional act. H.R. 1063, the bill which became Public Law 280, originally provided an exception for Indian fishing rights based on a federal *"law,* treaty or agreement." 99 Cong. Rec. 9962, 83d Cong., 1st Sess. (1953). (Emphasis added.)[8] But the word "law" was changed to "statute" prior to the bill's passage. In its original form, the bill clearly provided an exception for executive orders. In its amended form, the bill clearly removed this exception. As a result of the amendment, it is clear that Congress, which knows how to provide for Indian rights based on executive orders,[9] did not intend to provide an exception for executive orders in Public Law 280.

The amendment of H.R. 1063 was made by the House Committee on Interior and Insular Affairs, at the request of the U.S. Department of the Interior. California's Exh. 6(k). In recommending the amendment, the Department advised the committee that:

Supp. 106 (S.D. Cal. 1972). In those cases, the courts construed a federal anti-trespass statute, 18 U.S.C. § 1165, as a statute within the meaning of Public Law 280. We pointed out in the briefs below that this statute was solely intended to prevent trespass by non-Indian sportsmen on reservation lands, not to prevent the State from exercising its police power on such lands. Accord, *State ex rel. Nepstad v. Danielson,* 149 Mont. 438, 440, 427 P.2d 689, 691 (1967). The Court of Appeal in this case properly failed to repeat the theory of the *Donahue* and *Quechan Tribe* cases.

8. In fact, other bills had been previously considered, and rejected, by Congress which would have provided an exception for fishing rights based on a federal "law" or "custom." H.R. 3624, 82d Cong., 1st Sess. (1951); H.R. 5476, 82d Cong., 1st Sess. (1951); H.R. 3235, 82d Cong., 1st Sess. (1951); H.R. 459, 82d Cong., 2d Sess. (1951); S. 332, 83d Cong., 1st Sess. (1953). See California's Exh. 8.

9. For instance, Congress passed a law in 1946 which provides jurisdiction of the Court of Claims over Indian claims "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President . . . ." 28 U.S.C. § 1505.

> "Finally, the subsection relating to the protection of trust or restricted Indian property and of Indian fishing and hunting rights has been revised in an effort to make its provisions as *precise* and *certain* as possible." *Id.* at p. 3. (Emphasis added.)

Since the committee accepted the recommended change, it obviously accepted the reasons set forth in support of the change. Moreover, the Assistant Commissioner of Indian Affairs subsequently described the purpose of the amendment as follows:

> "By recommending that the words 'federal law, treaty or agreement' be changed to 'Federal treaty, agreement or statute,' it was intended to make clear that the rights, privileges or immunities to be preserved or protected were those which the Indians *expressly* reserved in treaties or agreements with the United States or which were *expressly* granted to Indians in a Federal statute." California's Exh. 6(g), pp. 1-2. (Emphasis added.)

Since Congress thus wanted only to exempt Indian fishing rights which were "precise and certain," and "expressly" based on a treaty, agreement or statute, it is apparent that Congress did not intend to exempt claimed rights based on executive orders, particularly rights that were not clearly established by such orders.

The lower court, faced with this clear expression of the congressional intent, simply chose to ignore it. The court stated that "Public Law 280 does not *state* that fishing rights derived from treaty, agreement, or statute will only be protected if the right was *expressly* granted." Appendix 1, p. 8. (Emphasis on "state" added.) Thus, the court ignored the legislative history on grounds that such history does not appear in the statute itself, on its face. No

citation is necessary, we believe, that the legislative history of a statute is highly significant in interpreting a statute, even though such does not appear in the statute. By concluding otherwise, the lower court has simply ignored the law.

Perhaps the lower court's failure to follow the law appears more clearly from its statement that "no reason appears why the manner in which the right was granted would make it more or less worthy of protection...." Appendix 1, p. 8. By thus disregarding the "manner" in which an asserted fishing right is created, the court ignored the fact that the exceptions contained in Public Law 280—which are limited to federal treaties, agreements and statutes—are directly tied to the *manner* in which the asserted right is created. Thus, by giving equal effect to claimed rights without regard to the manner of their creation, the court has simply read out of the statute the limitations which Congress—by the amendment process—painstakingly inserted. If the court's decision is not reversed, the limitations contained in that statute will have no significance whatsoever. It is difficult to imagine a clearer example of judicial legislation. If these limitations are to be removed from the statute, such is the task of Congress, not the courts.

In fact, we offered an explanation as to why Congress chose not to provide an exception for executive orders, but the lower court simply ignored our explanation in its decision. In our view, Congress, by refusing to provide such an exception, followed the distinction which has traditionally been drawn between executive orders and other federal laws, in defining the nature and extent of Indian rights. This distinction has particularly been drawn in determining

(1) whether Indians have a right to compensation for the loss of their rights, and (2) whether a fishing right was granted to Indians in the first place.

A. Compensation for Loss of Rights.

In *Sioux Tribe v. United States,* 316 U.S. 317 (1942), the Court noted:

> "The rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights based on treaty or statute reservations." *Id.* at 27.

Accordingly, the Court held that the federal government is liable for the taking of Indian rights based on treaties and statutes,[10] but not executive orders. Accord, *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 103 (1949). Thus, Congress, in not exempting executive orders from the effect of Public Law 280, perhaps intended to exempt only those rights which, in the event of their loss, would require the payment of compensation. This explanation finds support in the decision in *Menominee Tribe v. United States,* 391 U.S. 404 (1968). There, the Court stated that Congress intended to protect *treaty*-based fishing rights by the passage of Public Law 280, because Congress would otherwise be required to pay compensation to the Indians. *Id.* at 413. Since Congress need not similarly compensate Indians for the loss of asserted rights based on executive orders, Congress was not similarly motivated to provide an exemption for such rights from the effect of State law.

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10. As we shall see, an "agreement" within the meaning of Public Law 280 denotes a congressional statute ratifying an understanding between Indians and federal officials, and hence the United States would apparently be similarly liable for the taking of Indian rights based on such "agreements."

B. Granting of Fishing Rights.

However, there is an even more compelling explanation for Congress' refusal to provide an exception for executive orders in Public Law 280. The courts have been more reluctant to infer the creation of Indian fishing rights from executive orders than from other federal laws such as treaties and statutes, to the extent that such rights are beyond the reach of State law. In determining the effect of executive orders, the courts have looked not to the intent of the federal executive officer in issuing the order, but rather to the intent of Congress in authorizing the order to be issued.

For instance, in *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949), the Secretary of the Interior issued an executive order enlarging an Indian reservation, and giving Indians the exclusive right to fish on the reservation; the Court invalidated the order to the extent that it gave exclusive fishing rights to the Indians, on grounds that the Secretary lacked authority to grant such rights "in the absence of specific and unambiguous legislation." *Id.* at 105. In *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), an Indian tribe claimed that the Secretary of the Army, who issued permits to Indians to operate off-reservation fish traps, had exclusive authority to regulate the use of such traps, to the exclusion of State authority; the Court rejected this claim by noting that none of the congressional acts cited by the tribe, such as the White Act, 48 U.S.C. §§ 221-228, gave such exclusive authority to the Secretary. In *Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962), a companion case to the *Kake Village* case, another Indian tribe claimed that the Secretary of the Interior had exclusive authority to regulate the use of fish traps on a reservation; the Court upheld the tribe's claim on grounds that an 1891

congressional act gave such authority to the Secretary. Significantly, the Court distinguished the *Kake Village* and *Metlakatla* cases not only on grounds that a reservation was involved in one case but not the other, but also on grounds that Congress gave the Secretary the exclusive authority to regulate Indian fishing in one case but not the other. *Id.* at 62.

Thus, the *Hynes, Kake Village* and *Metlakatla* cases convincingly show that Indian fishing rights based on executive orders must be construed in light of the original congressional delegation of authority, not in light of the order itself. This is simply a manifestation of the general rule that a federal executive officer acquires only that authority which Congress delegates to him. *E.g., Miller v. United States,* 294 U.S. 435, 439 (1935). This principle seems particularly appropriate in defining the right of a State to regulate Indian conduct, for an executive order—unlike a treaty, agreement[11] or statute—is not subject to congressional approval. An executive order can be issued by an informal administrative process, without the open and deliberative discussions attendant to the congressional

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11. An "agreement," within the meaning of Public Law 280, is subject to congressional approval. In 1871, Congress passed a law prohibiting the President from entering into further treaties with Indian tribes, a move designed to give the House of Representatives a hand in dealing with the tribes. 16 Stat. 544 (1871); Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off. 1942), 67. Thereafter, Congress dealt with the tribes by passing statutes, rather than by ratifying treaties. *Ibid.* In instances where a statute ratified an understanding between federal officials and an Indian tribe, the statute was entitled an "agreement." *Ibid.* Several such "agreements" have been entered into between Congress and tribes. See, *e.g.*, 18 Stat. 167 (1874); 17 Stat. 456 (1873); 18 Stat. 36 (1874); *United States v. Seminole Nation,* 299 U.S. 417, 428 (1937); *DeCoteau v. District County Ct.,* ..... U.S. ....., 95 S.Ct. 1082 (1975). Thus, an "agreement" within the meaning of Public Law 280 is a statutory substitute for a treaty, utilized by Congress after it surrendered the power to make treaties in 1871.

process. In fact, the power to create an Indian reservation by an executive order does not even reside exclusively in the President; the power can be exercised by the head of an executive department,[12] or even by the head of an agency within the department.[13] Under these circumstances, the courts have wisely chosen to look to the intent of Congress, not the intent of the federal executive officer, in determining the rights of the Indians to act beyond the laws of the State in which they reside.

This principle, we submit, explains why Congress chose not to except executive orders from the effect of Public Law 280. On the one hand, a congressional delegation of authority to a federal executive officer to exclusively regulate Indian fishing, or at least to preclude State regulation of such fishing, creates Indian rights which are directly traceable to a congressional statute, and hence are protectable under Public Law 280 anyway; in that event, there is no need to provide an exception for executive orders issued by the federal officer. On the other hand, where no such congressional authorization was given, it is doubtful if the federal officer has authority to independently create any such Indian rights, and thus an executive order issued by such an officer should not be invoked as the basis for such rights. Congress thus meant to forestall the assertion of claimed fishing "rights" based—as here—solely on executive orders, where Congress did not provide for the creation of such rights. In this way, Congress thus sought

12. *Hynes v. Grimes Packing Co., supra* (reservation created by Secretary of the Interior).

13. *Northern Pac. R'y Co. v. Wismer*, 246 U.S. 283, 287-288 (1918) (reservation created by Indian inspector under direction of Commissioner of Indian Affairs); *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 338-339 (9th Cir. 1939) (reservation created by Commissioner of General Land Office).

to clarify the rights of the Indians and the States, an objective harmonious with the general purpose of Public Law 280 to authorize certain States to assume jurisdiction over specific Indian conduct and property. This, we submit, explains why the Department of the Interior, in recommending that the word "law" be changed to "statute" in H.R. 1063, concluded that this change would make the law more "precise and certain." California's Exh. 6(k), p. 3.[14]

The foregoing analysis indicates that we should look to Congress' intent in passing the 1853 and 1864 acts, not the intent of the President in issuing the 1855 and 1891 executive orders, in determining the effect of Public Law 280 here. Neither of these Congressional acts can remotely be construed as authority for the Indians to fish in violation of California law. The acts did not even create a reservation, much less any specific rights of Indians on a reservation. Rather, the acts merely authorized the President to create undefined reservations for undefined purposes at undefined locations. The acts did not suggest that any particular tribe should have the right to fish at any particular location, much less that any such right should be superior to California law. Thus, this is a perfect example of the situation which Congress had in mind in seeking, by the passage of Public Law 280, to clarify the rights of the Indians and the States.

Moreover, nothing in the 1853 or 1864 congressional acts suggests that the Secretary of the Interior, or any other federal officer, is to regulate Indian fishing on the Klamath

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14. Thus, the canon of construction which requires that ambiguities in "treaties and statutes ratifying agreements" be resolved in favor of Indians, *Antoine v. State of Washington*, ... U.S. ....., 43 U.S.L.Wk. 4257, 4259 (1975), which does not apply to executive orders anyway, was not intended by Congress to be applied in resolving ambiguities in executive orders under Public Law 280.

River Reservation. In fact, no federal officer regulates such fishing, or seeks to do so. Nor does the tribe itself regulate such fishing, or seek to do so. In fact, the tribe has not sought to intervene on the side of the petitioner, and has never given any indication of a desire to be responsibility for the management of the fishery.[15] Thus, this is not a case, as in *Kake Village* and *Metlakatla,* where a tribe sues a State to gain control over fishing by its own members; rather, this is a case where an individual Indian, caught in the act of violating State law, defends his nets by defending his conduct. Hence, the intervenor seeks the benefits of an exclusive fishing right, without bearing the burden—borne by California for many decades—of providing for effective management and control of the fishery. The intervenor's position would deprive the fishery—in terms of the Indians' access to the fishery—of any regulatory control by federal, State or tribal authorities. This result should be anathema in an age when we have learned, through difficult experience, that our natural resources are not inexhaustible, a lesson which has prompted recent congressional legislation urging the States to take the lead in protecting these resources. *E.g.,* Environmental Quality Improvement Act, 84 Stat. 114 (1970), 42 U.S.C. § 4371(b)(2) (1970). It was certainly not the intent of Congress in authorizing the President to issue the executive orders involved here—much less the intent of the President in issuing the orders—to achieve this result.

The lower court relied heavily on language in the *Metlakatla* decision, to the effect that the regulations adopted by the Secretary of the Interior might be read into the list of exceptions contained in Public Law 280. 369 U.S.

15. In fact, the Yurok tribe, unlike most Indian tribes, does not maintain a tribal roll, and has no cohesive tribal organization.

at 56-57; Appendix 1, pp. 6-7. Several factors undercut the significance of that conclusion here. First, the Court noted that the legislative history of Public Law 280 is "silent" and "here veiled from scrutiny." 369 U.S. at 57. Thus, the Court was unaware of the materials offered in this case which penetrate the legislative veil, and which show that Public Law 280 was only intended to protect claimed rights which are "precise and clear" and "expressly" based on a treaty, agreement or statute. Moreover, to protect itself against the possibility that the veil would be subsequently penetrated, the *Metlakatla* Court noted that, in any event, the fishing rights of the Indians were also based on the statute which established the reservation. The Court stated:

> "In any event, the proviso [in Public Law 280] also protects rights given the Indians by statute respecting the control and regulation of fishing, and the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior." *Ibid.*

Therefore, the decision hardly constitutes a definitive statement of the effect of Public Law 280 upon executive orders, and should not preclude that question from being reviewed in this case.

Second, the reservation in the *Metlakatla* case was established directly by congressional act, and the regulation issued by the Secretary of the Interior was in furtherance of the act's provisions. The act directed the Secretary to issue rules and regulations applicable to Indians on the reservation, a provision which—as noted by the Court—is "unusual." *Id.* at 53. Accordingly, the Secretary issued regulations—described by the Court as "without parallel," *ibid.*—which established a minimum number of fish allowed to escape from the traps, and required members of the tribe to secure fishing permits from the Secretary.

Id. at 47, 48. Thus, the congressional act contemplated that the Secretary—rather than the State—would manage the fishery resource, and the Secretary in fact did so.

The situation in this case is vastly different from that in the *Metlakatla* case. Here, unlike *Metlakatla,* the congressional acts do not authorize the Secretary to regulate Indian fishing. Here, unlike *Metlakatla,* the Secretary does not in fact regulate such fishing, or seek to do so. Here, unlike *Metlakatla,* the congressional acts did not even establish the reservation, much less the rights of Indians on the reservation. Thus, *Metlakatla* should not be construed, as held by the lower court, as a carte blanche for Indians to ignore State fishing laws because their "rights" are purportedly based on an executive order. Rather, *Metlakatla* should be construed as permitting such fishing only where Congress itself indicates, with reasonable clarity, that the fishery resource is to be managed by federal rather State authorities. No such congressional indication exists in this case.

Finally, the lower court, in providing an exception for executive orders based on a congressional statute, apparently would exclude exceptions for executive orders which are not based on such authority. This distinction leads to illogical and absurd results. Prior to 1887, the executive department frequently created Indian reservations by the issuance of executive orders, although it lacked congressional authorization to do so. *Sioux Tribe v. United States,* 316 U.S. 317 (1942). In 1887, Congress authorized the executive department to thereafter create Indian reservations, although this authority was rescinded in 1919. 24 Stat. 388 (1887); 41 Stat. 3, 34 (1919); *Sioux Tribe v. United States, supra.* Thus, the court's decision in this case, by including congressionally-authorized executive orders within the list

of exceptions in Public Law 280, would so include executive orders issued after 1887, but not prior to 1887. The effect of Public Law 280 upon Indian fishing rights based on an executive order would, under the court's opinion, thus depend on when the executive order was issued. This distinction has no relevance whatsoever to the purposes for which Public Law 280 was enacted, and nothing in that law or its legislative history suggests such a distinction.[16]

Therefore, Congress, in passing Public Law 280, clearly intended not to provide an exception for the fishing "rights" claimed by the intervenor here, and the conclusion of the lower court to the contrary is erroneous.

II. Indians on the Klamath River Reservation Are Subject to California's Fishing Laws When Fishing on Surplus Reservation Lands Owned by Non-Indians.

Prior to 1892, much of the land of the Klamath River Reservation were occupied by non-Indian settlers. H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Congress passed an act in that year which (1) set aside certain reservation lands for Indian trust allotments, tribal communities and tribal use, (2) authorized existing settlers to acquire title

16. In noting that the executive order in this case was issued pursuant to congressional authorization, the lower court distinguished this case from *Sioux Tribe v. United States, supra,* where the executive order was apparently not issued pursuant to congressional authorization. Appendix 1, pp. 5-6. However, nothing in *Sioux Tribe* supports a distinction between executive orders issued pursuant to a congressional act, and those that are not. Moreover, any such distinction was rejected by the later decision in *Hynes v. Grimes Packing Co., supra.* There, the Court relied on the *Sioux Tribe* decision in refusing to uphold an executive order granting exclusive fishing privileges to an Indian tribe, even though the order was issued pursuant to congressional authority. Thus, *Hynes* interprets *Sioux Tribe* as applying to all executive orders, regardless of whether such are issued pursuant to a congressional act.

to their lands, since such lands were surplus to the Indians' needs, and (3) opened up the remaining lands of the reservation, which were also surplus to the Indians' needs, to entry, settlement and purchase by non-Indians under the homestead laws. 27 Stat. 52 (1892).[17] The land on which the intervenor's nets were seized were part of the surplus lands held under non-Indian ownership.[18] The Court of Appeal held that the intervenor's right to fish in violation of California law extends to such lands, and is not limited to the other lands set aside for tribal use. Appendix 1, pp. 9-10. We pointed out that *specific* federal laws make California's fishing laws applicable on surplus lands held under non-Indian ownership. The lower court, however, failed to consider the effect of *any* of these laws in its decision.

Initially, we wish to emphasize that this question is important not only in California, but also in other states with reservation lands which are held, in part, under non-Indian ownership. Historically, reservation lands which were surplus to the Indians' needs were disposed of by either of two different methods. First, surplus lands on some reservations were "ceded," or sold, to the United States, which acquired absolute title to such lands; the United States then typically sold such lands to non-Indian homesteaders. *DeCoteau v. District County Ct.*, ... U.S. ...., 95 S.Ct. 1082 (1975); *Kennedy v. Becker,* 241 U.S. 556 (1916); Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942)

17. The surplus reservation lands not sold to non-Indians were "restored to tribal ownership," and "added to and made a part of the existing (reservation). . . ." in 1958. 72 Stat. 121 (1958).

18. The lower court erroneously stated that the nets were seized *at* Brooks Riffle, a spot where the intervenor's family traditionally fished. Appendix 1, p. 10. In fact, this Court found, during the previous appeal in this case, that the nets were seized *near*, not at Brooks Riffle, 412 U.S. at 484, a finding supported by the undisputed evidence in this case. CT 135; RT 66. The intervenor's family owns a trust allotment at the riffle, but the nets were not seized on the allotment. RT 60, 66.

[hereinafter "Cohen"], 334-336; U.S. Department of the Interior, *Federal Indian Law* (U.S. Govt. Printing Off., 1958) [hereinafter "Federal Indian Law"], 710-717. Second, surplus lands on other reservations were sold directly to non-Indian homesteaders, but were not formally "ceded" to the United States; the United States merely acted as a trustee of such lands for the Indians' benefit, but this trust status ceased upon the purchase of such lands by non-Indian homesteaders. *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *Cohen, supra* at 334-336; *Federal Indian Law, supra* at 710-717. The former method was prevalent prior to the 1880's, and the latter method, authorized by the General Allotment Act of 1887, 24 Stat. 388, was prevalent thereafter. *Ibid.* The 1892 act in this case, which incorporated the provisions of the General Allotment Act of 1887, apparently adopted the latter method in disposing of surplus lands of the Klamath River Reservation.[19]

This Court has held that surplus lands "ceded" to the United States, over which the United States acquires absolute title, lose their reservation status, and for that reason that State law is fully applicable on such lands. *DeCoteau v. District County Ct., supra; Kennedy v. Becker, supra.*[20] But the Court has yet to consider the applicability of the State's fishing laws, as in the instant case, upon surplus lands owned by non-Indians, where such lands were not formally "ceded" to the United States. Hence, this important issue is one of first impression in this case.

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19. However, it is not entirely clear that the surplus lands of the Klamath River Reservation were disposed of by the latter rather than the former method, for a 1958 congressional act, in restoring the unsold portion of such surplus lands to tribal ownership, referred to such lands as "ceded." 72 Stat. 121 (1958).

20. The Court recently reached the opposite result, however, in a case where the statute passing title to the United States in-

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The lower court, in holding that California's fishing laws have no effect on surplus lands owned by non-Indians, seemed to assume that such laws have no effect *anywhere* on the reservation, simply because of the fact that the lands are within a reservation. Such, however, is not the law. The applicability of California's laws on such surplus lands obviously hinges on Congress' intent in providing for non-Indian ownership of such lands. Cf. *Kennerly v. District Court,* 440 U.S. 423, 426-427 (1971); *Organized Village of Kake v. Egan,* 369 U.S. 60, 73-74 (1962); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973); *Antoine v. State of Washington, supra.* Here, both the 1891 executive order establishing the Klamath River Reservation, and the 1892 congressional act providing for the sale of surplus lands to non-Indians, *expressly* indicate that such lands are not reserved for the Indians' use, and thus that the State's fishing laws are applicable on such lands.

The 1891 executive order, establishing the reservation, provided "that any tract or tracts included within the above described boundaries (of the reservation) to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." 1 Kappler 815. This proviso clearly constituted a reference to surplus lands held by non-Indian settlers.[21]

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corporated an "agreement" specifically preserving the Indians' right to hunt and fish on such lands; there, the Court held that the State was unable to apply its hunting and fishing laws on such lands, unless it shows a proper conservation need for the application of its laws. *Antoine v. State of Washington,* ..... U.S. ....., 43 U.S.L.Wk. 4257 (1975).

21. According to a House report, this proviso was inserted to "[give] to those who have settled upon [the surplus lands] . . . in good faith the prior right to enter that portion upon which settlement has been made." H.R. Rep. No. 161, 52d Cong., 1st Sess. 1 (1892).

Although the proviso might support the broader conclusion that such lands are not even a part of the reservation, it at least supports the narrower conclusion that such lands are not reserved for the use of the Indians, and that the State's fishing laws are applicable to Indians on such lands. Although this matter was fully briefed, the Court of Appeal failed to consider the effect of the proviso in its decision.

The 1892 act, opening up the surplus reservation lands to settlement by non-Indian homesteaders, similarly indicated that such lands were not reserved for Indian use. The act defined such surplus lands as "lands within said reservation . . . *not reserved for the permanent use and occupation*" of the Indians, and differentiated such lands from those to be "set apart . . . for the permanent use and occupation" of the Indians. 27 Stat. 52, 53 (1892). (Emphasis added.) Additionally, the legislative history behind the 1892 act reveals that the act was passed because the Indians "do not need all the lands as presently reserved for their use," and that all lands "embraced within the said reservation are not needed (as a reservation) for Indian purposes." Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, pp. XLVIII-XLIX (1885); H.R. Rep. 1148, 47th Cong., 1st Sess. 2 (1882). Thus, the language and legislative history of the 1892 act show that the surplus reservation lands were not reserved for tribal use, and that Indians were not to fish on such lands in violation of State law. Again, the Court of Appeal failed to consider the effect of the 1892 act in its decision.

Our analysis is also supported by the legal effect of the 1892 act upon lands acquired by non-Indian homesteaders. The act vested such homesteaders with the *same* title that vested in other persons "under the laws of the United

States granting homestead rights . . . ." 27 Stat. 52 (1892). Under the homestead laws, 12 Stat. 398 (1862), State law fully applies to homesteaded property, once the homesteader has perfected title to his property. *Buchser v. Buchser,* 231 U.S. 157 (1913). Since State law is thus applicable to homesteaded property on non-reservation lands, State law is made applicable to homesteaded property on the Klamath River Reservation by virtue of the 1892 act. Again, the Court of Appeal ignored this argument.

Therefore, Congress clearly did not intend for the surplus lands sold to non-Indians on the Klamath River Reservation to be used for tribal purposes such as fishing. Such lands, unlike other lands on the reservation, were not held in trust by the United States for the Indians' use, for the trust status of the United States ceased upon the sale of such lands to non-Indian homesteaders. Such lands, unlike other lands on the reservation, were not in fact used by the tribe, or by individual Indians, for tribal activities such as fishing. Thus, Congress intended that any right of the Indians to fish was to be exercised on other reservation lands, not on the surplus lands. The disposition of these surplus lands contrasts sharply with their disposition in *Antoine v. State of Washington, supra,* where the State's attempt to regulate Indian fishing on surplus lands was rejected; there, the Indians' right to fish and hunt on such lands was *expressly* preserved by the act providing for the sale of such lands.[22]

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22. On this issue, the lower court cited the decisions in the *Antoine* and *DeCoteau* cases. Appendix 1, pp. 9-10. However, the court failed to note that the *Antoine* decision rested on the fact that the congressional act providing for the sale of surplus lands specifically incorporated an "agreement" preserving the Indians' right to hunt and fish on such lands. Moreover, the *Antoine* Court also noted that the State in that case made no attempt to show that its regulation was necessary for conservation purposes, im-

Additionally, if California's fishing laws are inapplicable on surplus reservation lands, apparently its other laws are equally inapplicable. For instance, California law prevents a person from trespassing upon the property of others, and from creating public and private nuisances. Calif. Pen. Code § 602; Calif. Civ. Code §§ 3479-3503. However, if California law is inapplicable on reservation lands owned by non-Indians, the intervenor can apparently not only fish on such lands in violation of the State's fishing laws, but also trespass upon such lands in violation of the State's property laws.

The lower court sought to avoid this result by stating that this is not a dispute between the Indians and private landowners, thus suggesting that the State's property laws —as opposed to its fishing laws—may be applicable on such lands. Appendix 1, p. 10. But this distinction makes no sense. If the State's property laws have effect on surplus reservation lands which the tribe does not traditionally use for tribal purposes, the State's fishing laws should have the same effect. In fact, the State's fishing laws, which seek to protect a fishery resource for the benefit of all citizens, stand on a stronger—not weaker—footing than the State's property laws, which merely seek to protect the interest of an individual. A proper exercise of the State's police power has always been held to override individual property rights; for instance, a proper exercise of the police power does not give rise to compensation for the loss of individual property rights. *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552 (1953). Thus, there is no basis for giving the

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plying that its result would be different if—as here—the State had attempted to make such a showing. 43 U.S.L.Wk. at 4262. We fail to understand how the *DeCoteau* decision supports the decision of the Court of Appeal, for that decision upheld the right of the State to regulate Indian fishing on surplus lands ceded to the United States.

State's property laws greater force on surplus reservation lands than the State's conservation laws, and the Court of Appeal failed to even suggest a basis for its distinction.

Therefore, whatever the right of the intervenor to violate California's fishing laws elsewhere on the reservation, this right does not extend to surplus reservation lands owned by non-Indians, lands which are not held in trust by the United States for the Indians' use and which have not been traditionally used for tribal purposes.

III. California Has the Right to Determine the Nature and Extent of Indian Subsistence Fishing, and Has Properly Done so in This Case.

The Court of Appeal ruled that the intervenor has the right to fish for subsistence purposes, and that California—by prohibiting the use of gill nets by Indians—is interfering with the exercise of that right. Appendix 1, p. 12. In fact, California allows Indians on that reservation to fish for subsistence purposes. Section 7155 of the State's Fish and Game Code, a statute passed solely for the benefit of Indians on that reservation, specifically allows the Indians to fish "for subsistence purposes." Appendix 3. The statute quantifies the nature of such subsistence fishing, in terms of numbers of fish and methods of taking, and in fact allows the Indians greater fishing rights than those enjoyed by the white man. But the statute prohibits the use of gill nets for subsistence purposes. Thus, the issue here is not whether the Indians should be allowed to fish for subsistence purposes, but rather (1) whether a State can determine the circumstances which constitute "subsistence" fishing, and (2) whether California's determination in this case, to the effect that gill nets are not necessary for subsistence, is correct. The lower court, by voiding section 7155 on the basis of no

credible evidence whatsoever,[23] answered both questions in the negative.

First, we strongly urge that a State has the right to determine the nature and extent of Indian "subsistence" fishing, if such a determination is reasonably supported by the evidence. Otherwise, it would be impossible for the State's enforcement officers to know whether, and how, to enforce its laws against Indians who, in the State's view, are taking more fish than necessary for subsistence. An excellent example of these administrative difficulties is found in this case. The intervenor was using five gill nets, totalling 268 feet in length. CT 135. It is ridiculous to suppose that the use of so many nets, and of such length, is necessary to enable the intervenor and his family to "subsist." Rather, the use of such nets enables the intervenor to catch more fish than he actually needs, thus encouraging him to waste or sell the excess fish. This is the very result which California's Legislature sought to prevent by prohibiting the use of gill nets for subsistence purposes.

Yet the lower court, without considering the size and number of nets involved in this case, apparently upheld the right of Indians to use *any* amount of gill nets of *any* size for the taking of *any* amount of fish. Thus, the court, in one breath holding that the Indians may fish without restriction for "subsistence" purposes, in the next breath precludes California from determining whether the Indians are actually so fishing. As a result of the court's decision, we do not know, for enforcement purposes, how many fish, or what kinds of fish, may be taken by the Indians, or by what means such fish may be taken. The court, in invalidating section

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23. The only evidence cited by the court for its conclusion consists of the intervenor's answer—a self-serving "yes"—to a conclusionary, leading question as to whether he uses gill nets for subsistence purposes. Appendix 1, p. 4; RT 55.

7155, has failed to set forth any guidelines, such as those found in section 7155, drawing the line between subsistence and non-subsistence fishing. The decision thus creates monumental problems of law enforcement as the State seeks to draw this line, which will surely result in renewed litigation. In fact, as a direct result of the lower court's decision, a comparatively small group of Indians, now free of any regulatory control by State, federal or tribal authorities, has begun to deliberately dump vast quantities of spoiled, excess fish on the river banks, to sell vast quantities of fish to non-Indians both on and off the reservation, to harass non-Indian fishermen and to threaten the use of firearms against California's fishing authorities.[24] This deteriorating situation demonstrates anew the inadvisability of substituting a judicial judgment for one that—with respect to the definition of "subsistence" fishing—properly lies within the legislative province. The Legislature, assisted by the arm of the executive department, is better equipped than the

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24. We are informed by several reliable sources that, since the lower court's decision, a comparatively small band of Yurok Indians has dumped several truck-loads of spoiled salmon on the river banks, set up a stand on the river bank at which salmon are sold, entered the camps of non-Indian fishermen at night to sell salmon at current market rates, sold other quantities of fish off the reservation to retailers, made it difficult for non-Indian fishermen to catch salmon during the day by harassing such fishermen with claims that the Indians "own" the river, and threatened to use firearms—which some Indians are reliably reported to be carrying—against State fishing authorities who seize any Indian nets in the future. See Appendix 6. Also, the intervenor's attorney was recently quoted as advising members of the tribe that, as a result of the lower court's decision, the tribal members have the right to license non-Indians when fishing on the river, and that these tribal members are making plans to provide such licensing authority. Del Norte Triplicate, Sept. 3, 1975, p. 1. Although the facts set forth in this footnote are obviously not in evidence, since they occurred subsequent to the lower court's decision, this Court may nonetheless consider these facts in determining, in its discretion, whether to grant our petition. Prettyman, "Petitioning The United States Supreme Court," 51 *Va. L. Rev.* 582 (1965).

judiciary to regulate a fishery resource on a day-to-day basis.

Second, the legislative judgment, in prohibiting the use of gill nets for subsistence purposes, is clearly correct. Gill nets are associated with commercial rather than subsistence fishing, and were not traditionally used for subsistence purposes by the Indians. According to a publication of the U.S. Department of the Interior, "a gill net is one of the oldest forms of nets used for commercial fishing." California's Exh. 11, p. 1.[25] An article written in 1942 by an anthropologist on Indian fishing techniques in northern California, published in an official State bulletin, stated that Indians fished in streams with A-frame nets, are dip nets, poisons and baskets. California's Exh. 12. Another article written in 1924, published in the same bulletin, indicated that Indians on the Klamath River fished by use of spears, traps and commercial wiers. California's Exh. 13. No mention is made in the articles of the use of gill nets, particularly for individual rather than tribal use. Thus, the Indians did not traditionally use, and hence do not presently need, gill nets for subsistence purposes.

The intervenor has offered no evidence whatsoever that Indians traditionally used gill nets for subsistence purposes, and in fact his evidence supports the opposite conclusion. First, the intervenor testified that he personally used gill nets on infrequent occasions since 1952. CT 49, 57, 58, 62-63, 69. Second, the intervenor's mother testified

25. California's exhibits 11 through 16 consist of legislative reports and other official federal and State publications, of which the court can take judicial notice. See Calif. Evidence Code § 452; *White v. State of California*, 21 Cal. App.3d 738, 742-743, 99 Cal. Rptr. 58, 60 (1971); *Atlantic Transport Co. v. Rosenberg Bros. & Co.*, 34 F.2d 843, 845 (9th Cir. 1929); *In re Plumer*, 9 F. Supp. 923 (S.D. Cal. 1935). These exhibits were attached as appendixes 1 through 6 to our petition for rehearing to the Court of Appeal.

that her father used gill nets for commercial purposes, hiring other Indians to operate the nets and transport the catch by wagons to commercial canneries. CT 73-75. That the intervenor infrequently used gill nets since 1952, after section 7155 was passed to prohibit such nets, hardly shows that the tribe traditionally used such nets for subsistence purposes. That the intervenor's grandfather used such nets for commercial purposes shows that the nets were not used for subsistence purposes. Since such nets were traditionally used to catch vast quantities of fish for sale, the nets are obviously not needed to catch limited quantities of fish for subsistence.

Moreover, gill nets are potentially destructive of the fishery in the Klamath River. A gill net is a highly selective device which can be stretched virtually across an entire river, and is thus capable of ensnaring virtually every member of a particular species which traverses that portion of the river. Hence, its use has been prohibited to the white man and Indians alike. Calif. Fish & Game Code §§ 8603, 8664, 11003, 11014, 11015, 11037.

Therefore, California's Legislature has properly determined that gill nets are not necessary for the Indians' subsistence, and are potentially harmful to the fishery. The lower court, in improperly rejecting a valid legislative judgment in favor of its own, failed to provide any alternative guidelines to those of the Legislature, and has created difficult problems of law enforcement which will surely exacerbate relations between California's Indian and non-Indian citizens. Fortunately, this Court now has the opportunity to arrest the deterioration of this situation by providing a definitive statement of California's authority to regulate Indian fishing in that area.

IV. California Has the Right to Regulate Indian Fishing for Conservation Purposes, at Least Where Such Fishing Is Not Regulated by the United States or the Tribe and Where California Grants Preferential Fishing Privileges to the Indians.

We argued below that the State has the right to regulate Indian fishing if such is reasonably regulated to the conservation of the fishery resource. The Court of Appeal responded by stating that "no case has come to our attention which has applied the power of a state to regulate fishing on an Indian reservation in the interest of conservation." Appendix 1, p. 11. However, the court acknowledged that this question has yet to be judicially resolved, that "the line at which State intervention might be necessary has not been drawn." *Ibid.* The court then suggested such a line by concluding:

> "Before the State is permitted to make inroads into subsistence fishing by Indians on their own reservation, all other conservation methods should be exhausted." *Id.* at 12.

We sympathize with the lower court's lack of judicial guidance on this question, and believe that this justifies an examination of the question by this Court. However, we strongly object to the test formulated by the lower court, which would allow a State to regulate Indian fishing for conservation purposes only when the State has "exhausted" its alternative conservation remedies.

First, the test proposed by the lower court is unrealistic. There are always conservation steps which a State can take short of regulating Indian fishing, but these steps may not be reasonable or practical. For instance, three dams, the Trinity, Lewiston and Iron Gate dams, sit astride the headwaters of the Klamath River, and its tributary the Trinity River. California's Exh. 16, p. 20; California's Exh. 15, p. 375. These dams provide valuable benefits to

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California citizens, and—by regulating streamflow—provide both fishing and flood control benefits to the Indians on the Klamath River Reservation. *Ibid.* But the dams also create downstream pollution that is injurious to the fishery in the Klamath River. *Ibid.* California has tackled the pollution problem by an intensive water quality control program. Calif. Wat. Code §§ 13000-13361. But the "exhaustion" test enunciated by the Court of Appeal would apparently require the dams to be leveled, and the entire area restored to a state of nature. Given the needs of our modern society, of which our Indian communities are part, this alternative has no practical significance. Thus, it is virtually impossible for a developed State to sustain the burden demanded by the Court of Appeal.

Second, the State's burden to establish a need to regulate Indian fishing for conservation purposes should be lessened where the fishery is not regulated by the United States, or the tribe. Otherwise, there would be no controls on such fishing whatsoever, a prospect that invites the possibility of the fishery's impairment or destruction. Here, the United States does not regulate the fishery. The tribe does not regulate the fishery. Thus, if California is unable to regulate the fishery, the intervenor and other Indians will be allowed to take whatever fish they want, by whatever means, regardless of the needs of the fishery.

Third, the State's burden to regulate Indian fishing for conservation purposes should also be lessened where the State, rather than discriminating against the Indians, affords them preferential fishing privileges which are withheld from the white man. Here, section 7155 of the State's Fish and Game Code frees the Indians on the reservation of any daily limits for the taking of fish, except with respect to certain critical species (trout, salmon, sturgeon). The section also frees such Indians of any seasonal limita-

tions as well. Thus, California gives preferential fishing privileges to these Indians, thus lending credence to our claim that the fishing restrictions which remain on the Indians are for the purpose of protecting the fishery, not for the purpose of discriminating against the Indians.

Under these circumstances, a more realistic test than that proposed by the lower court, in our view, would require the State at most to bear the burden of showing that the regulation of Indian fishing is a reasonable conservation measure, rather than requiring its antagonist to bear the burden of showing the opposite. This test would impose an evidentiary burden on the State in regulating Indian fishing which it does not bear in regulating fishing by others,[26] and yet allow the State to realistically fill the regulatory void created by the lower court's decision. Such a test would thus show due concern not only for the needs of the Indians, but also for the needs of the fishery.

Using the test which we propose, we have clearly shown that the regulation of Indian fishing is reasonably—indeed compellingly—related to the conservation of the fishery resource. According to a legislative study, the salmon fishery in the Klamath River is in a "critical," "alarming" and "grave" state. California's Exh. 16, pp. 20-21. The salmon runs in the river have steadily declined for several decades, *ibid.*, RT 86, 91, the spawning areas have been

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26. The State bears no burden at all in establishing its right to regulate the use of fishing nets by non-Indians. The regulation of such nets constitutes a reasonable exercise of the State's police power, since the regulation is directed at "the protection and conservation of food fish for the benefit of the present and future generations of the people of the state," and will not be overturned unless "palpably arbitrary." *People v. Monterey Fish Products Co.*, 195 Cal. 548, 556, 557, 234 Pac. 398, 401-402 (1925). Accord, *In re Marincovich*, 48 Cal. App. 474, 481, 192 Pac. 156, 159-160 (1920).

drastically reduced, and spawning stocks have dropped alarmingly.[27]

The Court of Appeal stated, however, that the Indians on the reservation were not the cause of the decline of the salmon runs, because they had fished in the river prior to the time that the decline was observed. Appendix 1, p. 12. But the court missed the issue. The issue is not whether the Indians *caused* the decline in the salmon runs, but rather whether unrestricted Indian fishing will *impair* the fishery. Since California has regulated Indian fishing on the reservation for several decades, obviously the Indians are not the cause of the fishery's current decline, and we do not so contend. Rather, we contend that the resumption of unrestricted Indian fishing will create an additional threat to the fishery, and thus compound the effect of other factors which have caused the decline. The lower court did not address itself to this concern. Rather, by freeing the Indians of California's regulatory program, the court used the success of the program as a basis for eliminating it altogether.[28]

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27. Although there were once 6,000 miles of salmon spawning areas in central valley streams, that figure was reduced to 528 miles in 1928 and 300 miles in 1959. California's Exh. 16, p. 20. Spawning stocks in these streams have dropped alarmingly. *Ibid.* The number of fish reaching the upstream hatcheries is barely at the minimum level to assure the fishery's survival. RT 28, 86, 91.

28. The Court of Appeal similarly ignored the potential impact of unrestricted Indian fishing upon the fishery. Several decades ago, many Indians on the Klamath River Reservation fished for commercial purposes under the guise of fishing for subsistence purposes, a situation which resulted in California's regulation of such fishing. California's Exh. 6(l). Since the Indians' own practices led to California's management program, there is no assurance that such practices will not be resumed if the program is eliminated. In fact, events subsequent to the lower court's decision clearly indicate that these practices can be expected to resume. Appendix 6. Moreover, many Indians on the Hoopa Valley Reservation proper, able to catch more fish as the result of streamflow

Of course, California's interest in regulating Indian fishing would be weaker if it were oblivious to the other problems which have contributed to the fishery's decline. These problems generally consist of water pollution caused by upstream dams and logging practices, and increased fishing pressure off the California and Oregon coasts and in the Klamath River itself. California's Exh. 16, pp. 20-21. But California has tackled these problems with diligence. To provide for improved water quality, it has passed, and vigorously enforces, several pieces of legislation to limit or prevent all forms of water pollution, including that caused by dams and logging practices.[29] To relieve pressure caused by increased fishing, it has banned high sea netting off the entire California coast. California's Exh. 16, p. 21. It has also restricted the seasons and gear for the taking of fish in the Klamath River by non-Indians. 14 Calif. Admin. Code §§ 20.60, 21.50(b)(1). In addition to regulating the conduct of others, California's fishing

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regulation resulting from upstream dams, have taken "a dangerously high proportion of the spawning runs" of the river. California's Exh. 15, p. 376. Since the Yurok Indians on the Klamath River Reservation vastly outnumber the Hoopa Indians on the Hoopa Valley Reservation proper, the elimination of fishing restrictions on the downstream reservation may have a potentially disastrous effect on the fishery. These facts strongly support the expert testimony of the official of the Department of Fish and Game who testified at the trial that the removal of such restrictions "would hurt the salmon and anadramous fish in the Klamath River." RT 27.

29. California's Porter-Cologne Act sets up regional boards to impose "requirements" for the discharge of pollutants in the State's waters. Calif. Wat. Code §§ 13000-13361. Another recent act authorizes the State's fishing authorities to prevent any streambed alteration, such as logging practices, which adversely affects anadramous fisheries. Calif. Fish & Game Code §§ 1601, 1602. Another law limits the environmental effects permissably caused by logging practices. Calif. Pub. Res. Code §§ 4511-4628.

authorities have directly managed the fishery resource in the Klamath River. They have built, and now operate, upstream hatcheries to provide spawning areas for the fish. RT 28, 86, 91; California's Exh. 16, p. 21. They have constructed artificial channels for natural propagation, to supplement the hatcheries. *Id.* at p. 20. They plant substantial amounts of salmon in the river each year. *Id.* at 21. They have torn down many small and unused dams, and removed much logging debris, in the Klamath River, both of which cause downstream pollution. California's Exh. 14; California's Exh. 15, p. 370. Thus, whether California has "exhausted" its conservation remedies, it has certainly pursued these remedies with unrelenting diligence.[30]

Therefore, California has shown that its regulation of Indian fishing in this case is reasonably related to the conservation of the fishery resource, that such fishing is not otherwise regulated by the United States or the tribe, and that it grants preferential fishing privileges to the Indians. It should not be required to sustain a heavier burden.

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30. The Court of Appeal also stated that the Indians could frustrate California's fishing laws by traveling to the upstream reservations, where, according to the court, California is unable to regulate Indian fishing. Appendix 1, p. 12. Although we do not concede that California is without power to regulate Indian fishing on the upstream reservations under facts resembling those in this case, the hypothetical situation posed by the court is unrealistic anyway. There is no evidence that Yurok Indians have ever traveled the substantial distances to the upstream reservations for fishing purposes. In fact, the Yurok, Karok and Hoopa tribes have historically confined their activities to the Klamath River Reservation, the Connecting Strip and the Hoopa Valley Reservation proper, respectively. 65 I.D. 59 (1958). Thus, the situation contrived by the court has not occurred, and is not likely to occur.

CONCLUSION

The courts have yet to clarify the right of a State to regulate Indian fishing on a reservation, and this case thus affords an opportunity for the Court to resolve that question. Moreover, the issues in this case are not limited to California, but also have significance in other States where Indian reservations are located. Finally, the lower court's treatment of these issues is, we submit, fundamentally incorrect. The lower court twisted the plain language of Public Law 280, and ignored its legislative history, to reach a result which is contrary to that intended by Congress. The court upheld the right of Indians to fish on surplus lands owned by non-Indians, even though these lands were neither reserved nor used for tribal purposes. The court, ignoring the fact that the nets in this case enabled the intervenor to take more fish than he needs for subsistence, failed to set forth any criteria to guide the State or the Indians in defining the line between subsistence and non-subsistence fishing, thus guaranteeing further litigation. The court, by denying California's right to regulate Indian fishing for conservation purposes, has created a regulatory void whereby such fishing is not regulated by federal, State or tribal authorities, a situation which bodes ill for the fishery.

The lower court's decision seems premised on the assumption that—once an area is determined to be a reservation—the State has no authority over the conduct of Indians in the area. Such is not the law. We thus urge the Court to grant our petition in order to clarify the State's

responsibility over its Indian citizens, and to rectify the mistakes of the lower court.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

Attorneys for Petitioner and Plaintiff

(Appendices follow)

Appendix 1

In the Court of Appeal of the State of California
First Appellate District, Division Three

Filed—May 27 1975
Court of Appeal—Firt App. Dist.
Clifford C. Porter, Clerk

1 Civil 35783
(Sup. Ct. No. 10434)

G. Raymond Arnett, as Director of Department of Fish and Game of the State of California,
Plaintiff and Appellant,

vs.

5 Gill Nets, et al.,
Defendants,

Raymond Mattz,
Intervenor and Respondent.

This is an appeal from a judgment involving the jurisdiction of the State of California to regulate fishing by Indians on the Klamath River Reservation.

In September of 1969, a California game warden seized five gill nets owned by Raymond Mattz, a Klamath River Indian. The Department of Fish and Game, through its director, petitioned the Superior Court of Del Norte County for authority to sell or destroy the nets. Mattz intervened in the action, claiming that the Fish and Game Code was not applicable to Indians fishing on their reservation. When the petition was first heard, the trial court found that the Klamath River Reservation, at the place where the nets

were seized, was not Indian country and, therefore, the gill nets prohibited by the Fish and Game Code were subject to seizure. On certiorari, the United States Supreme Court in *Mattz v. Arnett* (1973) 412 U.S. 481, reversed this judgment and held that the lower 20 miles of the Klamath River on which the nets were seized was still a reservation despite the opening of the land to non-Indian settlement in 1892. The cause was remanded for a determination of "the existence of Mattz, fishing rights and the applicability of California law notwithstanding reservation status." (412 U.S. at p. 485.)

The trial court concluded that the State may not regulate fishing by Indians on the Klamath River Reservation due to the fact that the federal government in transferring jurisdiction over Indian reservations to the State of California exempted the fishing rights here involved. The court ordered the nets returned to Mattz and the State has appealed.

Mattz "is a Yurok, or Klamath River, Indian who, since the age of nine, regularly fished, as his grandfather did before him, with dip, gill, and trigger nets, at a location called Brooks Riffle on the Klamath River. . . . The nets were stored near Brooks Riffle, approximately 200 feet from the river, and within 20 miles of the river's mouth." (412 U.S. at p. 484.)

The property on which the nets were found is owned by a private logging company. Although an 1892 Act of Congress opened the reservation land for settlement, the resulting ownership by non-Indians did not terminate the reservation but was "completely consistent with continued reservation status." (Mattz v. Arnett, supra, at p. 497.) The court explained, citing *Seymour v. Superintendent* (1962) 368 U.S. 351, 357-358): "'The Act did no more

[in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.'"

The land on which the nets were found is a part of what will be referred to as the Hoopa Valley Indian Reservation. The Hoopa Valley Indian Reservation is composed of three sections, as illustrated by the map below, which is included as an appendix to the opinion in *Mattz v. Arnett, supra,* at p. 507.

[Map of Hoopa Valley Indian Reservation and Extension Omitted]

The nets were found on the portion of Indian and known as the Klamath River Reservation, a two-mile wide strip of land extending from the mouth of the Klamath River on the Pacific Ocean for approximately 20 miles inland. The land was originally reserved for Indian use in 1855. By Act of March 3, 1853, 10 Stat. 238, the President was authorized to make reservations in the State of California for Indian purposes, and the Klamath River Reservation was made by presidential executive order two years later. In 1876, the 12-mile square area known as the Original Hoopa Valley Reservation was formally set aside by another executive order and in 1891 was extended to include the Klamath River Reservation and also a 30-mile strip in between these areas referred to on the map as the "Connecting Strip." The Supreme Court in *Mattz v. Arnett* explained that the reservations had been consolidated as one because an Act passed in 1864, 13 Stat. 39, had authorized the President to set apart no more than four

tracts for Indian reservations in California and by 1891, four reservations had already been so set apart. (412 U.S. at p. 493; see also Short v. United States, (Ct. Cl. 1973) 486 F.2d 561 for history of reservation.)

Mrs. Brooks, intervenor's mother, testified that her family fished with gills nets for their own personal use without State interference until the 1940's. During her girlhood, in the early years of the century, most of the Indians on the lower 20 miles of the river made their living by commercial fishing. Her son, however, fishes only for the subsistence of his family. Fish is a staple of his family's diet and according to intervenor's testimony, he can only catch sufficient fish for his family's needs by means of gill nets.

The State makes no effort to limit gill netting by Indians elsewhere on the Hoopa Valley Indian Reservation, i.e., on the connecting strip or the original Hoopa Indian Reservation. (See Fish & Game Code, § 12300.) On the Klamath River Reservation, the only method of taking fish that has been permitted is angling. In 1933, the State enacted Fish and Game Code section 429.8 (now § 7155) providing that Yurok Indians could obtain a permit to fish on the Klamath for subsistence without regard to seasons and under certain conditions not permitting gill netting. According to the testimony at trial, there has never been an application for a section 7155 permit. The Indians continue gill netting and suffering occasional arrests and confiscation of nets.

We agree with the trial court that the State did not acquire jurisdiction to regulate the fishing rights here involved by the transference of jurisdiction over Indian reservations to California. In 1953, jurisdiction over Indian reservations and over Indians on such reservations was transferred from the federal government to California by the passage of Public Law 280 (67 Stat. 588, 18 U.S.C.

§ 1162; 28 U.S.C. § 1360.) Public Law 280 provides, however, that its application shall not "deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity afforded under any Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The State takes the position that the asserted fishing rights here were not based on a treaty, statute or agreement but on executive order because the reservation itself was created by executive order. The Attorney General cites the case of *Sioux Tribe v. United States* (1942) 316 U.S. 317, as illustrative of the fact that there is a distinction drawn by the United States Supreme Court between Indian rights based on treaties and executive orders. The *Sioux Tribe* case is indeed informative but does not support the Attorney General. The Great Sioux Reservation was an Indian reservation whose borders had been delineated by treaty but a part of the public domain bordering on the reservation had been set aside for Indian purposes solely by executive order.[1] Later, executive orders returning the additions to the public domain were challenged by the Indians and compensation claimed. In denying the claims of the Indians, the court stated that "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." (316 U.S. at p. 326.)

Here, the creation of the reservation can be traced to Congressional authority, i.e., the Act of March 3, 1853, 10 Stat. 238, by which the President was "authorized to make five military reservations from the public domain in the

1. The order was deemed necessary for the suppression of the liquor traffic with the Indians. (316 U.S. at p. 320.)

State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." (See Mattz v. Arnett, supra, 412 U.S. at p. 487.) Whatever rights the Indians had on the reservation, therefore, were not created by executive order but by statute.

The State argues that this conclusion is contrary to the legislative intent and that the language "treaty, agreement, or statute" must be strictly construed to exclude fishing rights on reservations created by executive order even where the ultimate authority is statutory. The United States Supreme Court in *Metlakatla Indians v. Egan* (1962) 369 U.S. 45, did not accept an interpretation of the subject language to exclude fishing rights promulgated by regulation where the right to make the regulation was given by statute. The court explained at pages 56-57:

"This statute [Public Law 280] expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. It might plausibly be argued, therefore, that fishing rights given by regulation are not protected and state jurisdiction is established. Legislative history is silent as to the interpretation of the provision. See H.R. Rep. No. 848, 83d Cong., 1st Sess.; S. Rep. No. 699, 83d Cong., 1st Sess.; 99 Cong. Rec. 9962, 10782, 10928 (1953). The apparent purpose of the proviso was to preserve federally granted fishing rights. It would be sheer speculation to attribute significance to the imperfect parallelism of the provisions protecting property and fishing rights in the absence of any suggested reason for excluding fishing rights based on regulations. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference. Cf.

United States v. Mersky, 361 U.S. 431, 437. In any event, the proviso also protects rights given the Indians by statute respecting the control and regulation of fishing, and the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior."

The Attorney General takes the position that he has now unveiled legislative history which indicates that Congressional intent. For one thing, the State points out that Congress rejected the words *"law,* treaty, or agreement" in favor of *"statute,* treaty, or agreement." The Attorney General's position is that the intent of Congress was to exempt only those fishing rights *expressly* given to the Indians by the requisite instrument, whether it be statute, treaty, or agreement, and not to exempt rights which can only be inferred from a treaty, agreement, or statute. The choice of words, however, to designate the source of the protected right ordinarily would indicate nothing as to whether only an "expressed" right rather than an "inferred" right will be protected. As evidence of legislative intent, however, the Attorney General has offered a memorandum written on February 18, 1954, by the Assistant Commissioner of Indian Affairs to the California Area Director of the Bureau of Indian Affairs (BIA), which explained the reason for the language used as follows:

"By recommending that the words 'federal law, treaty or agreement' be changed to 'Federal treaty, agreement or statute,' it was intended to make clear that the rights, privileges or immunities to be preserved or protected were those which the Indians *expressly* reserved in treaties or agreements with the United States or which were *expressly* granted to Indians in a Federal statute." (Emphasis added.)

The Attorney General also draws the court's attention to letters from the years 1953-1954 from various persons

within the BIA generally stating that there were no California Indian hunting and fishing rights granted by treaty, agreement, or statute. It is respondent's position on these documents that, while it is true that an administrative interpretation as to the meaning of a statute is to be given respect, it is far from conclusive. (County of Marin v. United States (1958) 356 U.S. 412.)

Public Law 280 does not state that fishing rights derived from treaty, agreement, or statute will only be protected if the right was *expressly* granted. No reason appears why the manner in which the right was granted would make it more or less worthy of protection and it is concluded that no such limitation should be read into Public Law 280. It has been decided several times that the creation of a reservation "for Indian purposes" encompasses the right to hunt and fish on the reservation without further specification. (See Menominee Tribe v. United States (1968) 391 U.S. 404; United States v. White (8th Cir. 1974) 508 F.2d 453, 457; Donahue v. Justice Court (1971) 15 Cal.App.3d 557, 562; Kimball v. Callahan (9th Cir. 1974) 493 F.2d 564, 566; Quechan Tribe of Indians v. Rowe (S.D. Cal. 1972) 350 F.Supp. 106, 111.) This is particularly clear on the reservation in question which was obviously chosen with reference to the fishing. As the United States Supreme Court stated: "The site was ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was 'peculiarly adapted to the growth of vegetables.' 1856 Report 238; and the river, which ran through a canyon its entire length, abounded in salmon and other fish. Ibid.; 1858 Report 286." (412 U.S. at 487.)

Since the Indians on the Klamath River Reservation had fishing rights derived from Congress, State qualifications of those traditional rights was precluded by force of the

Supremacy Clause. (Antoine v. State of Washington (1975) .... U.S. ...., 95 S.Ct. 944, 951.) Thus, the attempt of the State to regulate fishing by passage of section 7155 of the Fish and Game Code was invalid even before the passage of Public Law 280.[2] It is now also improper because of the renewed guarantee of Indian fishing rights by Public Law 280.

Because of the conclusion that the fishing rights here derived from statute within the meaning of Public Law 280, it is unnecessary to consider the State's lengthy argument that there were no fishing rights derived from an "agreement" within the meaning of Public Law 280 and unnecessary to consider the dictum to this effect in *Elser v. Gill Net Number One* (1966) 246 Cal.App.2d 30.

The Attorney General also contends that even if reservation status was not terminated by the Act of 1872, the State could at least regulate fishing on reservation lands owned by non-Indians. This does not appear to be the consequence of opening a portion of the reservation to settlement by non-Indians. (See Seymour v. Superintendent (1962) 368 U.S. 351, 357-358.) In a case in which reservation status was found to have been terminated, the United States Supreme Court noted: "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government 'notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation.' 18 U.S.C. § 1151(a). On the other hand, if the lands are not within a continuing reserva-

2. The trial court's conclusion that the Legislature passed section 7155 in the mistaken belief that Klamath River Reservation was no longer a reservation is reasonable. The State took the position in *Mattz v. Arnett* that the reservation had been terminated in 1892 when Congress opened the area to settlement. The legislative motive, however, does not appear to be relevant to the validity of the legislation.

tion, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.' 18 U.S.C. § 1151(c)." (DeCoteau v. District County Court (1975) .... U.S. ...., 95 S.Ct. 1082, 1084, fn. 2.)

The case of *Antoine v. State of Washington, supra,* involved an attempt by the State of Washington to regulate hunting by Indians on land which had once been a reservation but which had been ceded to the United States by the Indians. The Indians, however, had retained hunting rights through agreement ratified by Congress. The court held that the Supremacy Clause precluded state qualification of those rights. In a concurring opinion, Mr. Justice Douglas remarked: "An effort is made to restrict these hunting rights to public lands, not to tracts ceded by this Agreement and taken up by private parties. The Agreement, however, speaks only of the ceded tract, not the ultimate disposition of the several parts of it. We would strain hard to find an implied exception for parcels in the ceded tract that ended up in private ownership. . . . Whether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached. We have here only an issue involving the power of a State to impose a regulatory restraint upon a right which Congress bestowed on these Indians." (95 S.Ct. at p. 954.) Here, too, we are not involved in a dispute between the owner of private land and the Indians. And it is noted that, although the nets were concededly upon private land when seized, the fishing was undertaken by intervenor from a spot known as Brooks Riffles from which his family traditionally fished.

The State finally argues that the State has a right under its police power to qualify the Indian fishing rights on the

reservation in the interest of conservation and contends that section 7155 is a proper conservation measure. The State relies upon two cases involving Indian fishing rights wherein the United States Supreme Court has narrowly construed the fishing rights to permit State regulation of the rights in the interest of conservation. (Puyallup Tribe v. Dept. of Game (1967) 391 U.S. 392; Kake Village v. Egan (1961) 369 U.S. 60.) Both cases, however, involved off-reservation fishing and "[e]ven where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation." (369 U.S. at p. 75.) In both cases, also, the Indians were fishing commercially as well as for subsistence and regulation was seen as a necessity to prevent extermination of the fish runs. No case has come to our attention which has applied the power of a state to regulate fishing on an Indian reservation in the interest of conservation.

This court in *Donahue v. Justice Court, supra,* 15 Cal. Cal.3d 557, a case involving fishing rights on the original Hoopa Valley Reservation, in dictum, noted that "the state is not precluded from exercising its general police power under factual situations reasonably requiring the exercise of such power," and cited *People v. Rhoades,* 12 Cal.App.3d 720, in which the State was permitted to exercise its police power on a reservation in enforcing a safety regulation requiring removal of flammable growth adjacent to a building. The State contends that the danger to the salmon from gill netting on the Klamath is such as to require State intervention in the interest of preserving the fish. The record on this argument is not persuasive. While it is recognized that the line at which State intervention might be necessary has not been drawn, several factors militate against the success of an argument of necessity here. First,

the problem with gill netting is simply that it increases the number of fish taken from the river and the State does not want the fish taken from the river before they can get to the hatcheries or spawning grounds. Yet, the hatcheries are over 100 miles from the mouth of the river and the State only proposes restricting gill netting on the first 20 miles. By statute it permits gill netting on the other sections. (Fish & Game Code, § 12300, see Elser v. Gill Net Number One, supra, 246 Cal.App.2d 30.) Apparently, the Indians, if removed from their traditional fishing grounds, could move a few miles away and gill net the salmon again before they reached the hatcheries. The State's argument for necessity is also weakened by the fact that no showing has been made that other conservation methods could not first be tried. For example, sport fishing is still permitted below the hatcheries and there is no evidence as to the extent of this fishing. Testimony was introduced that the salmon runs have decreased markedly in the last 30 to 40 years; the Indians have been gill netting for subsistence for over a century. Witnesses for the State had no figures on the size of the catch through gill netting. There is no evidence of substance in the record that would lead to the conclusion that subsistence fishing by Indians is the cause of the decrease in the salmon runs and that regulation of this fishing is the only means of solving the problem. Before the State is permitted to make inroads into subsistence fishing by Indians on their own reservation, all other conservation methods should be exhausted.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

.....

Brown (H. C.), Acting P. J.

We concur:

.....

Scott, J.

.....

Devine, J.*

Arnett v. 5 Gill Nets
1 Civil 35783

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*Retired Presiding Justice of the Court of Appeal, assigned by the Chairman of the Judicial Council.

Court of Appeal of the State of California
in and for the
First Appellate District

Division Three

Jun 26, 1975
Court of Appeal—First App. Dist.
Clifford C. Porter, Clerk

No. 35783

G. Raymond Arnett, etc.,
Plaintiff and Appellant,

vs.

5 Gill Nets, etc.,
Respondent,

Raymond Mattz,
Intervenor and Respondent.

BY THE COURT:

The petition for rehearing in the above entitled cause is hereby denied.

Dated Jun 26, 1975

DRAPER, P. J.

Clerk's Office, Supreme Court
4250 State Building

San Francisco, Cailfornia 94102
Jul 23 1975

I have this day filed Order .....

.....

.....

HEARING DENIED

.....

.....

.....

.....

In re: 1 Civ. No. 35783

Arnett
vs.
5 Gill Nets

Respectfully,

G. E. BISHEL
Clerk

Appendix 2

Public Law 280, Chapter 505

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the

exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

Appendix 3

CALIFORNIA.

Hoopa Valley Reserve

By virtue of power vested in me by an act of Congress approved April 8, 1864, and acting under instructions from the Interior Department, dated at Washington City, D. C., April 26, 1864, concerning the location of four tracts of land for Indian reservations in the State of California, I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation, to be known and called by the name and title of the Hoopa Valley Reservation, said reservation being situated on the Trinity River, in Klamath County, California, to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised ahd purchased as soon as the Interior Department may direct.

AUSTIN WILEY,
Superintendent Indian Affairs
for the State of California.

FORT GASTON, CAL., *August 21, 1864.*

EXECUTIVE MANSION, *June 23, 1876.*

It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast

corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3'; thence south 17½ degrees west, 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)

U. S. GRANT.

EXECUTIVE MANSION, *October 16, 1891.*

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

BENJ. HARRISON.

Appendix 4

27 Stat. 52 (1892):

CHAP. 120.—An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase

any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided,* That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 1892.

Appendix 5

California Fish and Game Code § 7155: Permit to Yurok Indians to take fish for subsistence; rights under permit. Notwithstanding any other provision of this code, California Indians who are bona fide registered members of the Yurok Indian Tribe may take fish, for subsistence purposes only, from the Klamath River between the mouth of that river and the junction of Tectah Creek with it, exclusive of tributaries, without regard to seasons, under the following conditions:

(a) Upon application therefor, the department shall issue to any Yurok Indian who is listed on the register of the Yurok Tribal Organization, as furnished to the department, a renewable, nontransferable permit to take fish pursuant to this section for a period of one calendar year. Any Indian of the Yurok tribe while taking fish pursuant to this section shall have upon his person such valid permit, and shall display it upon the request of any duly authorized officer.

(b) Hand dip nets, and hook and line only may be used for taking fish pursuant to this section.

(c) Pursuant to this section not more than three trout or salmon or combination thereof, or more than one sturgeon, may be taken in any one day. There is no bag limit on any other fish.

(d) No Yurok Indian while fishing pursuant to this section may be accompanied by any person who does not possess a valid permit as prescribed by this section. It is unlawful for any person who does not hold such permit to accompany any Yurok Indian who is taking fish pursuant to this section.

(e) The sale of any fish taken under the provisions of this section shall constitute cause for permanent revocation by the commission of the permit held by the person making the sale. (Stats.1957, c. 456, p. 1419, § 7155.)

Appendix 6

(Original lodged with Clerk of U.S. Supreme Court)

AFFIDAVIT OF DUNCAN SNELL

I, DUNCAN SNELL, after being duly sworn and deposed, state:

I am a Patrol Captain for the State of California, Department of Fish and Game, and in my capacity as Patrol Captain for the Fish and Game, I supervise the activities of the Wildlife Protection Officers throughout Humboldt, Del Norte and Trinity Counties, including the Lower 20 miles of the Klamath River. I have been in charge of Humboldt and Del Norte Counties including the Lower 20 miles of the Klamath River since March 13, 1972.

Since the decision of the Court of Appeal on May 27, 1975, the California Department of Fish and Game has not attempted to regulate fishing by Indians on the Lower 20 miles of the Klamath River, pending a final decision in the case by higher appellate authority. The Yurok tribe itself does not have a tribal organization as such, and there appears to be no attempt by tribal authority to regulate fishing by Indians on that portion of the river. As a result of such lack of regulation by State or tribal authority, a situation has developed which, in my opinion, threatens the future migration of salmon into the entire Klamath River system.

Since the decision of the Court of Appeal, there have been many instances in which a comparatively small number of Indians have deliberately wasted quantities of fish which were caught by gill nets. For instance, a report from a reliable source indicates that six truck-loads of spoiled salmon were dumped by a few Indians at the south bank of the river near its mouth. Another report was received that a truck load of fish was dumped by Indians in the Klamath dump.

BLEED THROUGH

Our office has received many other reports of spoilage and wasteage of fish.

Also, since the Court of Appeal's decision, many Indians have begun to catch fish for patently commercial purposes. A common practice has developed whereby certain Indians, who now operate gill nets in the river, harass and intimidate non-Indian fishermen who are limited to taking fish with a rod-and-reel. This harassment takes the form of physical threats, and claims that the Indians now "own" the river and have the right to exclude non-Indians from fishing in the river. At the end of the day, these same Indians then proceed to non-Indian camping areas, and offer to sell the fish at the market rate of $.80 to $1.50 per pound. On at least one occasion, a fish stand was set up by Indians on a river bar, and more than 100 salmon were sold on a first come, first serve basis at $1.00 per pound. In addition, we have reason to believe that vast amounts of fish are now being sold off the reservation by certain Indians to retailers.

Another problem that has developed since the Court of Appeal's decision has been a growing threat of physical violence. Certain Indians are reliably reported to be carrying firearms, and have threatened to shoot any State official who seizes the Indians' nets. Indians have even threatened other Indians over the best fishing areas, and reports have been received that such Indians have displayed guns, knives, and machetes in a threatening manner. On one occasion, an Indian physically assaulted a California fishing official with his fists.

Perhaps the worst situation to develop since the Court of Appeal's decision, however, has been the growing threat to the fishery itself. Many Indians are now using gill nets which measure over 100 feet in length with a weighted bottom line and a floated or cork top line. This device allows

no escape by salmon which come into the net. This is a highly efficient and productive method of taking fish. The nets are so numerous that they impede the progress of those who go down the river in boats. As a result of this situation, it is my opinion that the fishery on the lower Klamath River, which for several years has been one of the best producers of salmon and steelhead in the nation, is now in jeopardy as a result of the Court of Appeal's decision.

Finally, we have also been informed that there is a division of opinion within the Yurok community over the fishing practices of the comparatively small number of Indians who are engaged in the above practices, and that much of the Yurok community opposes these practices.

/s/ DUNCAN SNELL
DUNCAN SNELL

STATE OF CALIFORNIA }
COUNTY OF HUMBOLDT } SS.

I, DUNCAN SNELL, named in the foregoing instrument certify under penalty of perjury, that every statement or thing contained therein is true to the best of my knowledge and belief.

/s/ DUNCAN SNELL

Subscribed and sworn to before me
this 10th day of September, 1975.

/s/ CATHERINE C. LIBS
Notary Public

in and for the County of Humboldt,
State of California.

[SEAL]

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-527

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,
Petitioner and Plaintiff,

vs.

5 GILL NETS, etc.,
Defendants,

RAYMOND MATTZ,
Respondent and Intervenor.

Reply Brief of Petitioner and Appellant

EVELLE J. YOUNGER
Attorney General of the State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920

Attorneys for Petitioner and Plaintiff

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

OCTOBER TERM, 1975

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G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,

Petitioner and Plaintiff,

vs.

5 GILL NETS, etc.,

Defendants,

RAYMOND MATTZ,

Respondent and Intervenor.

Reply Brief of Petitioner and Appellant

ARGUMENT

We file this Reply Brief, under Rule 24(4), for the purpose of responding to a single issue raised by the intervenor for the first time in this case. At page 10 of his opposition to our petition, the intervenor states that his nets were merely "stored" on privately-owned lands, and that there is no evidence that the nets were actually used in violation of California law. None of the lower courts in this case have regarded this issue as material. In fact, this fact is entirely irrelevant under California law. Section 8664 of California's Fish and Game Code, cited in our petition for writ of certiorari, provides that "any net found in,

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or within 500 feet of the Klamath [River] . . . is prima facie evidence that the owner or person in possession of the net is or has been using it unlawfully." The nets in this case were left unattended in a tub approximately 200 feet from the Klamath River. CT 151. Therefore, the facts of this case present a prima facie case that the intervenor was using the nets in violation of California law.

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920

Attorneys for Petitioner and Plaintiff

In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-527

G. RAYMOND ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME, STATE OF CALIFORNIA, PETITIONER

v.

5 GILL NETS, ETC., AND RAYMOND MATTZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT, DIVISION THREE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of December 15, 1975, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

The decision below was rendered on remand from this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481.

In 1969 a California game warden seized five gill nets owned by Raymond Mattz, a Yurok (Klamath River) Indian, and instituted a forfeiture proceeding in state court on the ground that the nets were contraband under

BLEED THROUGH

BLURRED COPY

the Califoria Fish and Game Code. When seized, the nets were being stored some 200 feet from the Klamath River within the Klamath River Indian Reservation.[1] Mattz intervened in the forfeiture proceeding asserting his ownership of the nets, his use of them at his family's traditional fishing location, and the inapplicability of the California Fish and Game Code to his fishing activities within the Reservation. The state trial court held that the Reservation had been abolished and ordered the forfeiture. The state court of appeal affirmed (see *Mattz, supra,* 412 U.S. at 483–485). This Court reversed, holding that the Reservation had not been abolished and that all land within it remained "Indian country" within the meaning of 18 U.S.C. 1151 (412 U.S. at 506). The Court remanded the case for determination of the "questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status" (*id.* at 485).

On remand, the state trial court, after an evidentiary hearing (see Pet. App. 12), held that the State may not regulate fishing by Indians on the Klamath River Reservation and ordered the nets returned (see Pet. App. 2). The state court of appeal, in a thorough opinion, affirmed (Pet. App. 1–12). The court held that the creation of a reservation "'for Indian purposes' encompasses the right to hunt and fish on the reservation without further specification" (Pet. App. 8), citing, *inter alia, Menominee Tribe v. United*

[1] The nets were located on land owned by a logging company (Pet. App. 2).

States, 391 U.S. 404, and that "[t]his is particularly clear on the reservation in question which was obviously chosen with reference to the fishing," citing *Mattz, supra,* 412 U.S. at 487 (Pet. App. 8).

The court also rejected the State's contention that the State had acquired jurisdiction to regulate Indian fishing within the Reservation as a consequence of Public Law 280, 67 Stat. 588, 18 U.S.C. 1162 (Pet. App. 4–9). That Act extends to the State of California jurisdiction over offenses committed by Indians within Indian country in the State, but also provides (18 U.S.C. 1162(b)) that nothing therein shall deprive any Indian or Indian tribe of any fishing right "afforded under Federal treaty, agreement, or statute." The court rejected the State's contention that the proviso did not apply to the Klamath River Reservation because the Reservation was established by executive order, noting that the Reservation was "not created by executive order but by statute"—the Act of March 3, 1853, 10 Stat. 226, 238, by which the President was authorized to set aside five reservations "for Indian purposes" (Pet. App. 5–6). The court also rejected the State's contention that the proviso was intended to exclude fishing rights granted by executive order, finding such an interpretation to be unwarranted by the legislative history of the Act (*id.* at 6–8).

Finally, the court rejected, as unsupported by the facts, the State's contention that it had authority to regulate fishing within the Reservation as a necessary conservation measure. The court found "[t]he record

on this argument * * * not persuasive" (Pet. App. 11, see discussion at 11–12).[2]

The Supreme Court of California denied the State's petition for review (Pet. App. 15).

ARGUMENT

In our view the decision below is correct, does not conflict with any decision of this Court or any other court, and presents no issue of general importance requiring review by this Court.

1. The history of the establishment of the Klamath River Indian Reservation by executive orders and congressional Acts as a home for the Yurok Indians and other tribes that lived and fished along the Klamath River, is set forth in detail in *Mattz, supra,* 412 U.S. at 485–494. The California court of appeal correctly held that the creation of the Reservation under these circumstances reserved to the Indians the right to fish on the Reservation without state interference.

There are two sources of this right. First, it stems from the general principle that bars the States from exercising jurisdiction over the activities of Indians within Indian reservations, except where affirmatively authorized by Congress. See *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 167–173; *Williams* v. *Lee,* 358 U.S. 217; see also *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 147–149; *Alva Fisher* v. *The District Court of the Sixteenth Judicial District of Montana,* No. 75–5366, decided *Per curiam,* March 1, 1976. Second, the special right to hunt and fish free from

[2] The court also rejected the State's contention that it could confiscate the nets because they were on non-Indian land (Pet. App. 9–10).

limitation by state authorities is implicit in the reservation of the land. *Menominee Tribe* v. *United States,* 391 U.S. 404, 406, 412, n. 12. This is particularly clear here, for as the Court noted in *Mattz, supra,* 412 U.S. at 487, the Klamath River site was chosen as a reservation because it was the Indians' historic home and the river "abounded in salmon and other fish."

That executive orders played a prominent role in the creation of the Reservation does not change this result. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. Accordingly, in *Arizona* v. *California,* 373 U.S. 546, the Court rejected Arizona's argument that water rights for Indian reservations could only be reserved by treaty and that four executive-order reservations along the lower Colorado River lacked reserved water rights. 373 U.S. at 598. See also *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9).

Nor has the Court drawn distinctions, for purposes of criminal jurisdiction, on the basis of the method of establishing a reservation. The Colville Reservation, which was the subject of the Court's decision in *Seymour* v. *Superintendent,* 368 U.S. 51, holding state criminal law inapplicable to crimes involving Indians anywhere within an Indian reservation, was a reservation established by executive order. See also *Antoine* v. *Washington,* 420 U.S. 194, 205–206.

With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

2. Petitioner's primary contention (Pet. 12–25) is that Public Law 280 granted the State control over Indian fishing on the Klamath River Reservation. Congress, in Public Law 280, granted California "jurisdiction over offenses committed by or against Indians in the areas of Indian country" within the State. 18 U.S.C. 1162. However, the statute continues with the proviso that (18 U.S.C. 1162(b)):

> Nothing in this section shall * * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Petitioner argues that the proviso is inapplicable to Indian fishing on the Klamath River Reservation because the Reservation, and thus any fishing right, was established by executive order rather than "treaty, agreement, or statute." The court of appeal properly rejected this contention (Pet. App. 4–9).

In *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 57, this Court interpreted the same proviso as protecting Indian fishing rights established by regulation, despite the absence of the word "regulation" in the proviso. The Court pointed out that the authority to make the regulation was statutory and that "[t]he apparent purpose of the proviso was to preserve *federally granted fishing rights*" (emphasis added), even though created by regulation.

Likewise, the fishing rights enjoyed by the Indians in connection with this Reservation are afforded by statute—the statutes authorizing establishment of the Reservation. As this Court recognized, in *Mattz* the Reservation was set aside by executive order in 1855 or 1891. In either case the executive order was based on previous Acts of Congress—the Acts of March 3, 1853, 10 Stat. 226, 238, and March 3, 1855, 10 Stat. 686, 699, or the Act of April 8, 1864, 13 Stat. 39; see *Mattz, supra,* 412 U.S. at 484, 487–494. See, also, *Donnelly* v. *United States,* 228 U.S. 243, 255–259.

Petitioner suggests (Pet. 17) that rights based on executive order were deliberately not protected in Public Law 280 because Congress set out to safeguard only those rights for which it might owe compensation under the Fifth Amendment, and that under *Sioux Tribe* v. *United States,* 316 U.S. 317, no compensation would be owed for abolishing a reservation created by executive order. There is, however, nothing in the legislative history of the Act stating such a purpose. Moreover, there is no reason why Indians on a reservation established by executive order should have less right of self-government or less protection for their resources from state interference than Indians on other reservations. There is thus no reason to assume that Congress intended to preserve fishing rights on all reservations but those established by executive order.

3. Petitioner's final contentions (Pet. 25–42) are that even if respondent has a fishing right as a result

of the creation of the Reservation, and even if that right has been preserved by Public Law 280, the right is subject to state regulation when exercised on non-Indian owned land, the right may be limited by the State to subsistence fishing, and the right may be regulated by the State in the interest of conservation. We deal with these in turn.

a. Respondent's fishing within the Reservation was at his family's traditional fishing spot on the river (Pet. App. 10), not on private land. The nets were stored on private land, but without objection by the landowner. No issue is presented here regarding the right of an Indian to fish from private land. Cf. *Antoine* v. *Washington,* 420 U.S. 194, 212 (Douglas concurring); see also *United States* v. *Winans,* 198 U.S. 371.

b. Petitioner cites no authority, and we know of none, that would limit an Indian's on-reservation hunting or fishing to subsistence. The purpose of a reservation is not to restrict Indians to a subsistence economy but to encourage them to use the assets at their disposal for their betterment. See *McClanahan, supra,* 411 U.S. at 169–171. Moreover, Indian fishing rights have on several occasions been interpreted by this Court as extending to commercial fishing. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392, 395–396; *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44, 48. The court of appeal thus properly rejected petitioner's contention that the State could prohibit net fishing by respondent as a means of limiting him to subsistence fishing (Pet. App. 8–9).

c. The court of appeal also properly rejected petitioner's contention that it could impose its prohibition of net fishing against respondent as a conservation measure (Pet. App. 11–12). We know of no authority that would permit state regulation of Indian fishing *within* an Indian reservation for conservation purposes. State regulation, where necessary for conservation, has been permitted in regard to the exercise of *off-reservation* Indian hunting and fishing rights. *Puyallup Tribe, supra; Antoine* v. *Washington, supra.* But even in regard to off-reservation rights there must be a factual showing of the necessity for restricting the Indian right rather than restricting the hunting and fishing privileges of others. See *Antoine* v. *Washington, supra,* 420 U.S. at 207. There has been no such showing here (Pet. App. 10–12).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

[3] The affidavit of Duncan Snell (Pet. App. 25–27), which petitioner filed with the Clerk and which concerns alleged fishing abuses on the Reservation after the decision of the court of appeal, may be relevant to future litigation or administrative action by the tribe or the United States, but it has no bearing on the issue of this case, which is whether the State acted within its authority in seizing respondent's nets in 1969. There is no evidence that respondent's fishing was in any way detrimental to conservation.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-527

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Petitioner and Plaintiff,

vs.

5 GILL NETS, etc.,

Defendants,

RAYMOND MATTZ,

Respondent and Intervenor.

On Petition for a Writ of Certiorari to the California Court of Appeal, First District, Division Three

Petitioner's Reply to Amicus Memorandum of United States

EVELLE J. YOUNGER
Attorney General of the State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920

Attorneys for Petitioner and Plaintiff

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioner's Reply to Amicus Memorandum of United States

We file this brief, pursuant to Rule 24(4), to reply to new arguments and issues raised by the United States in its amicus memorandum.

Initially, we find it difficult to understand the United States' position that California is without jurisdiction to regulate Indian fishing under the circumstances of this case. The United States' position is not necessary to protect any federal interest, since the United States does not regulate, and has never sought to regulate, Indian fishing on the reservation. Nor is its position necessary

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to protect any tribal interest in self-government, since the tribe does not regulate, and does not seek in this case to regulate, such fishing. In view of this lack of federal or tribal interest, the United States' position, in seeking to deny California's regulatory efforts, promises to create an anarchical situation with respect to Indian fishing on the reservation; in fact, this promise is now in the process of fulfillment. Pet., App. 6. This result, we submit, does not further the legitimate interests of the Indian community, which cannot benefit from the regulatory void which California seeks to fill. Nor does this result protect the interests of California, which hopes, in filling this void, to protect the fishery resource. Thus, the United States, in a surprisingly inflexible response to a fishing dispute between a state and an Indian, has ignored the fact that federal and tribal interests do not need or deserve protection from state interests under the facts of this case.

1. Public Law 280.

In our opening brief, we argued that the savings provision in Public Law 280, which is limited to Indian fishing and hunting rights "afforded" under a federal "treaty, agreement or statute," 67 Stat. 588 (1953), 18 U.S.C. § 1162 (1970), is not applicable to claimed rights based on a presidential executive order. The United States has responded that executive orders have frequently been held to authorize the creation of Indian reservations and rights, citing the decisions in *Arizona v. California*, 373 U.S. 546 (1963), and *Seymour v. Superintendent*, 368 U.S. 51 (1962). Amic. Memo., 5.

The United States' argument is not responsive to our position. The question in this case is not whether Indian fishing rights were *created* by the executive orders issued in 1855 and 1891. Rather, the question is whether such rights, assuming *arguendo* that they were created by the

executive orders, *survived* the passage of Public Law 280, at least to the extent that such rights are beyond the reach of State law. Indeed, Congress, by passing Public Law 280, intended to obviate the necessity of considering the very issue raised by the United States, *i.e.* whether such rights were created in the first place.

In our petition, we suggested that Congress, in refusing to include executive orders within the savings provision in Public Law 280, was motivated by the fact that Indian rights based on executive orders have traditionally been given less sanctity than Indian rights based on treaties, agreements or statutes. Pet., 18-25; *Sioux Tribe v. United States*, 316 U.S. 317 (1942). This distinction, we suggested, derives from the fact that executive orders—unlike treaties, agreements or statutes—are not subject to congressional approval. Thus, Congress apparently did not wish to perpetuate claimed "rights" based on executive orders —particularly because of the extent to which such "rights" might impair vital conservation interests of the states—unless the intent to establish such rights could reasonably be inferred from the congressional act authorizing the issuance of the executive order. This analysis of the congressional intent, we pointed out, is supported by the judicial reluctance to infer the creation of Indian fishing "rights" based on executive orders, where such "rights" are inconsistent with state laws, in the absence of a reasonably clear expression of Congress' intent to authorize the creation of such rights. See *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlaktala Indian Community v. Egan*, 369 U.S. 45 (1962). The United States, by arguing that an executive order can under some circumstances result in the creation of Indian rights, has advanced a proposition that is unassailable, but that is not relevant to the issues in this case.

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Next, the United States argues that the reservation in this case was created by a statute, within the meaning of the savings provision in Public Law 280, because the executive orders establishing the reservation were issued pursuant to congressional acts of 1853 and 1855. Amic. Memo., 7. This argument is merely an effort to accomplish indirectly what Congress, by refusing to include executive orders in the savings provision, forbade to be accomplished directly. In fact, Indian reservations were commonly created by executive orders prior to 1887, although such orders were not issued pursuant to congressional authorization; Congress passed an act in that year requiring that such executive orders be issued pursuant to congressional authorization thereafter. 24 Stat. 388 (1887); *Sioux Tribe v. United States, supra;* Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942), 299. Thus, the United States' argument would distinguish between executive orders issued before and after 1887, with respect to the effect of Public Law 280. This distinction is wholly unrelated to the purposes for which Public Law 280 was passed. Finally, the 1853 and 1864 congressional acts involved in this case did not even create the reservation, much less the rights of Indians on the reservation; rather, they merely authorized the President to create undefined reservations for undefined tribes at undefined locations for undefined purposes. It is simply a perversion of the congressional intent to suggest that these congressional acts fall within the savings provision in Public Law 280.

The United States argues that the Court in *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), regarded the savings provision in Public Law 280 as including a "regulation." Amic. Memo., 6. As mentioned in our petition, the *Metlakatla* Court observed that Congres *itself*, by auth-

orizing the Secretary of the Interior to issue regulations regarding Indian fishing, intended for such fishing to be regulated by federal rather than state authorities, and that the Secretary in fact exercised this authority by closely regulating such fishing. Pet. 22-24. This decision hardly supports the position of the United States here, where Congress failed to provide for federal rather than state control of Indian fishing, and even failed to directly create the reservation itself. In fact, since neither federal nor tribal authorities regulate, or seek to regulate, Indian fishing on the reservation in this case, the United States' position would result in a situation where—unlike *Metlakatla*—the fishery resource is lacking in any responsible management or control whatsoever. Surely the *Metlakatla* Court would not have tolerated such an ecologically unsound result.

The United States, in its memorandum, has totally ignored the language, legislative history and surrounding circumstances of Public Law 280. First, the United States ignored the fact that the language of the savings provision makes no reference to executive orders. Second, it ignored the fact that the provision was amended, by changing the word "law" to "statute," 99 Cong. Rec. 9962, 83rd Cong., 1st Sess. (1953), to exclude executive orders. Third, it ignored the fact that the amendment was made at the urging of the Department of the Interior, in order to make the provision as "precise and certain" as possible and to assure that it would include only rights that were "expressly" contained in treaties, agreements or statutes. California's Exhs. 6(k), 6(g). Fourth, it ignored the fact that the Commissioner of Indian Affairs, after long study, concluded that there was no federal "statute," much less a federal "treaty" or "agreement," that prohibits California from applying its fishing laws to its Indians, after the

passage of Public Law 280. California's Exh. 6(f). Thus, the United States, apparently reflecting a newly-formed position of the Department of the Interior, is seeking to change a congressional policy that was originally established at the behest of that Department, and that was contemporaneously construed by the Department in a manner different from that now suggested by the United States. If this congressional policy is to be changed, it must be changed by Congress, not by executive fiat. The United States is in effect is attempting to "remake history," notwithstanding Justice Stewart's admonition, in *DeCoteau v. District Court*, 420 U.S. 425, 449 (1975), that it may not do so.

2. Non-Indian Owned Lands.

We noted in our petition that the *specific* language of the 1891 executive order establishing the reservation, and the *specific* language of the 1892 congressional act opening up the reservation for homestead entry and settlement, precluded the Indians from exercising tribal rights on lands owned by non-Indians within the reservation. Pet., 28-29. The United States made no reference to this language in its memorandum, and thus hardly made an effort to respond to our argument.[1]

3. Subsistence Fishing.

The Court of Appeal held that the Indians may fish "for subsistence purposes" on the reservation, in violation of

1. The United States stated that the nets were stored on privately-owned lands "without objection by the landowner." Amic. Memo., 8. This is not true. The nets were stored on lands owned by the Simpson Logging Company, CT 135, which is now contesting in litigation the right of Indians to trespass, for fishing purposes, on lands owned by the logging company within the reservation. See *Blake et al. v. Arnett et al.*, U.S. Dist. Ct., No. C-72-2140 (N.D. Cal.). That case has been stayed pending outcome of the instant matter.

California law. Pet., App. 1, pp. 4, 12. We argued, in our petition, that the California Legislature may properly determine the circumstances for such subsistence fishing. Pet., 32-36. We then pointed out that the Legislature, by passing a statute in 1951 that allows Indians on the reservation to fish "for subsistence purposes" but prohibits the use of gill nets for that purpose, has concluded that gill nets are not necessary for subsistence fishing. *Ibid;* Cal. Fish & Game Code § 7155. Thus, even if the Indians have the right to fish for subsistence purposes, California may prohibit the use of gill nets for that purpose.

The United States has responded by claiming that the Indians on the reservation should not be limited to subsistence fishing, but should also be allowed to fish for commercial purposes in violation of California law. Amic. Memo., 8. Thus, the United States has not defended the lower court's conclusion that the Indians are limited to subsistence fishing; instead, it has advanced a new theory that, although not advanced below, was apparently rejected by the lower court. We fail to see how the Indians on the reservation in this case can be held to have the right to fish for commercial purposes, since they did not *traditionally* fish for commercial purposes and since they do not even claim this right. Perhaps this question will be raised and resolved in a future case. In any event, the issue has not been raised here, and cannot be resolved here. Thus, the United States has simply failed to respond to our argument that the state's legislature may properly determine, and has determined, that the use of gill nets is not necessary for subsistence purposes.

4. Conservation.

In response to our argument that California has the right to regulate Indian fishing for conservation purposes,

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Pet., 37-42, the United States notes that it knows of "no authority that would permit state regulation of Indian fishing *within* an Indian reservation for conservation purposes." Amic. Memo., 9. (Emphasis in the original.) This statement indicates only, as we have noted, that this issue is one of first impression, and thus deserves the attention of this Court. The United States also argues that "there has been no such showing here [of the necessity for regulating Indian fishing]." *Ibid.* In our petition, we described at length the evidence which supports our view that the regulation of the fishery is a vital conservation measure, Pet., 37-42, and the United States, again failing to respond to our argument, made no reference to this evidence whatsoever.

CONCLUSION

The United States, in its memorandum, has consistently avoided meeting the arguments raised in our petition. This deficiency convincingly suggests that its position is not based on the law, but represents an executive revision of a long-standing congressional policy. We urge the Court to grant our petition in order that California may continue to exercise the jurisdiction which it has historically exercised pursuant to that congressional policy.

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920

Attorneys for Petitioner and Plaintiff